African Presidents and the International Criminal Court

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A legal analysis of the African Union's concerns about the Prosecution and Trial of Sitting Heads of State and Government

Proefschrift

ter verkrijging van de graad van doctor aan de
Rijksuniversiteit Groningen op
gezag van de
rector magnificus prof. dr. E. Sterken en volgens
besluit van het College voor Promoties.

De openbare verdediging zal plaatsvinden op

maandag 8 januari 2018 om 12:45 uur

door

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geboren op 8 juli 1989
te Groningen

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Contents

List of Abbreviations

ASP	Assembly of States Parties of the ICC
AU	African Union
AUPSC	African Union Peace and Security Council
CAR	Central African Republic
CICC	Coalition for the International Criminal Court
COMESA	Common Market for Eastern and Southern Africa
DRC	Democratic Republic of the Congo
EACJ	East African Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
FIDH	International Federation for Human Rights
GoK	Government of Kenya
HRW	Human Rights Watch
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
IGAD	International Governmental Authority on Development
ILC	International Law Commission
LRA	Lord Resistance Army
NGO	Non-Governmental Organization
OAU	Organization of African Unity
ODM	Orange Democratic Movement (Kenya)
OTP	Office of the Prosecutor of the ICC
P5	Five permanent members of the UN Security Council
PEV	Post-election Violence in Kenya (2007-2008)
PNU	Party of National Unity (Kenya)

PTC	Pre-Trial Chamber of the ICC
RPE	Rules of Procedure and Evidence of the ICC
SADC	Southern Africa Development Community
SALC	South African Litigation Centre
UN	United Nations
UNAMID	AU/UN Hybrid operation in Darfur
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

Chapter 1

Introduction and Legal Framework

The International Criminal Court (ICC) is under a lot of pressure these days. After years of romantic enthusiasm for international criminal justice,[1] states and commentators are increasingly questioning whether the Court can live up to the promises of the Rome Statute.[2] Calls for alternative forms of justice that may be delivered by local or regional justice mechanisms are becoming stronger.[3] For now, the Court and the principles that are embedded in its legal mandate continue to enjoy the support of a large part of the international community. Yet, the ICC is facing a lot of criticism, which visibly constrains its ability to investigate and prosecute international crimes.

One of the most difficult challenges that confronts the ICC today is its war-like relationship with Africa. Many African leaders backed the Court's establishment in 1998,[4] and after the Rome Statute entered into force in 2002, Uganda and the Democratic Republic of the Congo (DRC) brought the first cases to the ICC.[5] In these and related ways, African states made a substantial contribution to the

[1] Payam Akhavan, 'The Rise, and Fall, and Rise, of International Criminal Justice' (2013) 11 *Journal of International Criminal Justice* 527-536.

[2] The Rome Statute of the International Criminal Court, 17 July 1998, UN Treaty Series, volume 2187, and p. 3 (entered into force on 1 July 2002).

[3] For an overview of alternative local and regional justice mechanisms in Africa, see Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (eds.), *Africa and the ICC: Perceptions of Justice* (New York: Cambridge University Press, 2016), pp. 17-22.

[4] African states were central participants in all stages of the drafting process of the Rome Statute, see Hassan Jalloh and Fatou Bensouda, 'International Criminal Law in an African context', in Max du Plessis (ed.), *African Guide to International Criminal Justice* (Pretoria: Institute for Security Studies, 2008), pp. 15-53; Phakiso Mochochoko, 'Africa and the International Criminal Court', in Evelyn A. Ankumah and Edward K. Kwakwa (eds.), *African Perspectives on International Criminal Justice* (Maastricht: Africa Legal Aid, 2005), pp. 241-258.

[5] Encouraged by the Prosecutor, Uganda and the DRC asked the Court to investigate crimes committed on their own territory. These 'self-referrals' were constructed under Article 14(1) of the Statute. By voluntarily submitting themselves to the

development of the Court. In the past decade, however, a sizeable group of African states has turned against the ICC. They have accused the Prosecutor of selectively targeting Africans, they have refused to cooperate with the Court in high-level cases and several African states have even threatened to withdraw from the Rome Statute.[6] The protest of these and other African states has not been univocal and does not reflect the views of all African states, let alone all Africans.[7] Still, it can hardly be denied that the ICC has an 'Africa problem'.

jurisdiction of the ICC, Uganda and the DRC affirmed their commitment to the Court. Yet, as the investigations proceeded, it became increasingly clear that their cooperation also had a strong strategic character, in the sense that they were based on a convergence of interests between the Office of the Prosecutor (OTP) and the Governments of Uganda and the DRC. It remains unclear whether the OTP made any promises to President Museveni or President Kabila about the scope of its investigations, but the Court's first cases did trigger perceptions of selectivity and raised questions about whether the Prosecutor should solicit governments to refer situations to the ICC in which they are (in)directly involved. See generally Clarke, Knottnerus and de Volder, 'Africa and the ICC', pp. 14-15.

[6] At the time of writing (August 2017), 34 African states are a party to the Rome Statute. In late 2016, three states (South Africa, Burundi and Gambia) notified the Secretary General of the UN of their decision to withdraw from the Rome Statute. As specified in Article 127, withdrawals take effect one year after the date of receipt of the notification of withdrawal and will not discharge the respective states from their obligations arising from the Rome Statute while it was a Party to the Statute. In February 2017, the Government of Gambia notified the Secretary General of its decision to rescind that notification of withdrawal with immediate effect. The same decision was taken by the Government of South Africa in March 2017, after the High Court of South Africa had declared its initial withdrawal decision unconstitutional. See UN Treaties Collection (C.N.786.2016.TREATIES-XVIII.10), Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court, 19 October 2016; UN Treaties Collection (C.N.805.2016.TREATIES-XVIII.10), Depository notification withdrawal by the Republic of Burundi, 27 October 2016; UN Treaties Collection (C.N.862.2016.TREATIES-XVIII.10), Depository notification by the Islamic Republic of the Gambia, 10 November 2016; UN Treaties Collection (C.N.62.2017.TREATIES-XVIII.10), Depository notification by the Islamic Republic of Gambia, 10 February 2017; Democratic Alliance v. Minister of International Relations and Cooperation, Judgment Gauteng Division of the High Court, 22 February 2017; UN Treaties Collection (C.N.121.2017.TREATIES-XVIII.10), Depository notification by the Republic of South Africa, 7 March 2017. For a complete overview of the signatures, ratifications and accessions of African states to the Rome Statute, see annex I.

[7] Some African states, such as Botswana, have publically distanced themselves from the African Union's position on the ICC, and many civil society organizations, legal experts and victim communities in Africa continue to defend the Court's work. As

Here and elsewhere, the opposition of African states against the Court is understood to be a matter of regional concern. The reason for this is that the African Union (AU) plays a leading role in criticizing the ICC. Initially, the AU encouraged its member states to ratify the Rome Statute,[8] and even entered into negotiations on a cooperation agreement with the Court.[9] Yet, the AU's policy on the ICC changed dramatically after 2008 when the Prosecutor asked the Pre-Trial Chamber (PTC) to issue a warrant for the arrest of President Omar al-Bashir of Sudan.[10] This request was immediately opposed by the AU Peace and Security Council (AUPSC)[11] as well as the AU Assembly of Heads of State and Government (AU Assembly).[12] In its first reaction, the AUPSC asked the UN Security Council to defer al-Bashir's prosecution in order to protect the peace process in Darfur.[13] When the Council did not act

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I have surveyed elsewhere, the Court has many different audiences in Africa and their perceptions of the ICC are far from uniform. Clarke, Knottnerus and de Volder, 'Africa and the ICC', pp. 6-10.

[8] This is in line with the AU's ambitious human rights agenda. Article 3(H) of the AU Constitutive Act states that the AU shall 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'; Article 4(H) provides that the AU has a right to intervene 'in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'; and Article 4(O) mentions the 'condemnation and rejection of impunity' as one of the principles of the AU. The Constitutive Act of the African Union, 11 July 2000, UN Treaty Series, Volume 2158, p. 3 (entered into 26 May 2001).

[9] AU Commission, Strategic Plan of the Commission of the AU - Volume 3 (2004-2007 Plan of Action), p. 65; AU Assembly, Decision on the Vision and Mission of the African Union and Strategic Plan, Programme and Budget of the Commission, Assembly/AU/Dec.33(III), 6-8 July 2004, para. 1. Note that the Organization of African Unity (the predecessor of the AU) also supported the ratification of the Rome Statute: OAU, Grand Bay (Mauritius) Declaration and Plan of Action, 16 April 1999, para. 13(m).

[10] OTP, 'Prosecutor's Statement on the Prosecutor's Application for a warrant of Arrest under Article 58 Against Omar Hassan Ahmad AL BASHIR', 14 July 2008; *Al-Bashir* (ICC-02/05-01/09-3), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 3 March 2009.

[11] The AUPSC is composed of fifteen African states which are elected by the Assembly for a term of two years (ten states) or three years (five states).

[12] As stated in Article 6(1) of the AU Constitutive Act, the AU Assembly is composed of the Heads of State and Government of the 54 member states of the AU or their duly accredited representatives.

[13] AUPSC, Communiqué, PSC/MIN/Comm(CXLII), 21 July 2008, paras. 10-11.

on this request, the AU Assembly instructed its member states not to cooperate with the arrest of al-Bashir.[14] Looking back, these decisions mark the start of the AU's ongoing campaign against the ICC.

In the course of the AU's powerful opposition against the ICC,[15] one of the most important reasons for African states to criticize the Court has been the prosecution and trial of sitting Heads of State and Government. Combined with accusations of selectivity and neo-imperialism, the opposition of the AU against the ICC has mainly been directed at the prosecution of sitting African presidents and at the negative effects that these proceedings allegedly have on fragile African states.

The AU's first critical decisions on the ICC focussed on the case against al-Bashir. Since 2013, however, the AU has also strongly criticized the Court for continuing the trials of Uhuru Kenyatta and William Ruto. Kenyatta and Ruto were elected for a first term as President and Deputy President of Kenya in March 2013, despite facing trials at the ICC for their alleged role in the 2007-2008 Post-Election Violence in Kenya.[16] In the shadow of the cases against Kenyatta, Ruto and al-Bashir, the AU

[14] AU Assembly, Decision on the Meeting of African states parties to the Rome Statute of the International Criminal Court, Assembly/AU/Dec.245(XIII), 1-3 July 2009, para. 10. Since 2010, President al-Bashir has travelled to eight different African states parties (Chad, Kenya, Djibouti, Malawi, Nigeria, the DRC, South Africa and Uganda). For references and further discussion on al-Bashir's visits to states parties, see chapter 3.

[15] As I have argued elsewhere, the AU's campaign against the ICC is 'powerful' in the sense that it undermines the Court's perceived legitimacy. Legitimacy, in the sociological understanding of the word, refers to the perceptions that the different audiences of an institution have about the appropriateness of its norms and decisions. In this sense, an international court like the ICC possesses legitimacy to the extent that its rulings and broader normative framework are perceived by its audiences as 'appropriate, proper, and just'. Abel S. Knottnerus, 'The AU, the ICC and the Prosecution of African Presidents', in Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (eds.), *Africa and the ICC: Perceptions of Justice* (New York: Cambridge University Press, 2016), pp. 152-153. This conception of sociological legitimacy builds on Tom Tyler, 'Psychological Perspectives of Legitimacy and Legitimation' (2006) 57 *Annual Review of Psychology* 375-400; Ian Hurd, *After Anarchy - Legitimacy & Power in the United Nations Security Council* (Princeton: Princeton University Press, 2007), pp. 7-12, 30-45. On the relation between power and perceived legitimacy: Chris Reus-Smit, 'International Crises of Legitimacy' (2007) 44 *International Politics* 160-165. More generally, on different conceptions of power: Michael Barnett and Raymond Duvall, 'Power in International Politics' (2005) 59 *International Organization* 39-75.

[16] Note that Kenyatta and Ruto were elected for a second term as President and Deputy President of Kenya in August 2017.

has portrayed the Court as a serious threat to the stability and sovereignty of African states and has searched for ways to protect them and other sitting African presidents from prosecution and trial by the ICC.[17] Such efforts have been 'successful' in the sense that al-Bashir has not been arrested, whereas the Court has been forced to close the cases against Kenyatta and Ruto, amidst accusations of witness interference and non-cooperation by the Kenyan Government.[18]

An important point of reference in the AU's ongoing campaign against the ICC, and against the prosecution and trial of sitting Heads of State in particular, is a decision of the AU Assembly from October 2013. In this decision, the assembled African leaders declared that 'no charges shall be

[17] A fourth case that has played a marginal role in the AU's opposition against the prosecution and trial of sitting Heads of State is the case against the former Libyan leader Muammar Gaddafi, who was prosecuted for crimes against humanity in 2011. At that time, Gaddafi's prosecution sparked a powerful reaction from the AU, arguing that it complicated 'the efforts aimed at finding a negotiated political solution to the crisis in Libya'. AU Assembly, Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/Dec.366(XVII), 30 June-1 July 2011, para. 6. Shortly after this decision, however, Gaddafi was killed. Later that year, when the AU recognized the National Transitional Council as the new legitimate representative of the Libyan people, the prosecution of Gaddafi and the investigation in Libya quickly disappeared from its political agenda. Recently, in June 2017, the investigation in Libya received renewed media coverage after the reported release of Gaddafi's son Saif al-Islam by the Abu-Bakr al-Siddiq Brigade of Zintan in Libya. In response to these reports, the ICC has called for his immediate arrest and surrender. The Prosecutor has accused Saif al-Islam of the crimes against humanity of murder and persecution, allegedly committed in Libya in 2011. OTP, ICC Prosecutor calls for the immediate arrest and surrender of the suspects, Mssrs Saif Al-Islam Gaddafi and Al-Tuhamy Mohamed Khaled to the Court, 14 June 2017.

[18] At the time of writing (August2017), the cases against Kenyatta and Ruto are considered closed. Amidst accusations of witness interference and non-cooperation by the Kenyan Government, the Prosecutor withdrew the charges against Kenyatta in December 2014. This case is considered closed unless and until the Prosecutor submits new evidence. In April 2016, the Trial Chamber also vacated the charges against Ruto (and his co-accused Joshua Sang) after two of the three judges concluded that the evidence presented by the Prosecutor was too weak to continue the trial. OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta, 5 December 2014; *Kenyatta* (ICC-01/09-02/11-1005), Decision on the withdrawal of charges against Mr Kenyatta, 13 March 2015; OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding Trial Chamber's decision to vacate charges against Messrs William Samoei Ruto and Joshua Arap Sang without prejudice to their prosecution in the future, 6 April 2016; *Ruto and Sang* (ICC-01/09-01/11-2027-Red), Public redacted version of Decision on Defence Applications for Judgments of Acquittal, 4 April 2016.

commenced or continued before an International Court or Tribunal against any serving Head of State or Government or anybody acting or entitled to act in such capacity during their term(s) of office'.[19] In follow-up to this decision, the AU adopted a plan to grant African leaders personal immunity before the future Criminal Chamber of the African Court,[20] and called upon the ICC's Assembly of States Parties (ASP) to amend the Rome Statute in such a way that sitting (deputy) presidents can be exempted from prosecution and trial at the Court.[21] Most recently, in January 2017, the AU Assembly even agreed to adopt a 'strategy' for the collective withdrawal of African states from the Rome Statute.[22] This strategy

[19] AU Assembly, Decision on Africa's Relationship with the ICC, Ext/Assembly/AU/Dec.1(Oct.2013), 11-12 October 2013, para. 10(i).

[20] Article 46A*bis* of the Malabo Protocol on the formation of a Criminal Chamber to the African Court of Justice and Human Rights provides that: 'no charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions during their tenure of office'. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, available online at: <http://www.au.int/en/sites/default/files/treaties/7792-file-protocol_statute_african_court_justice_and_human_rights.pdf>. At the time of writing (August 2017), nine states have signed the Protocol, but none of the required fifteen states has ratified it. On the planned Criminal Chamber, see generally Abel S. Knottnerus, and Eefje de Volder, 'International Criminal Justice and the early formation of an African Criminal Court', in Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (eds.), *Africa and the ICC: Perceptions of Justice* (New York: Cambridge University Press, 2016), pp. 376-406. For a detailed analysis of Article 46A*bis* see Dire Tladi, 'The Immunity Provision in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff' (2015) 13 *Journal of International Criminal Justice* 3-17.

[21] AU Assembly, Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court, Assembly/AU/Dec.493 (XXII), 30-31 January 2014, para. 11. This proposal has formally been introduced to the ASP by Kenya. UN Treaties Collection (C.N.1026.2013.TREATIES-XVIII.10), Kenya: Proposal of Amendments, 14 March 2014. For an overview of the AU's proposed amendments, see annex II.

[22] AU Assembly, AU Assembly, Decision on the International Criminal Court, Assembly/AU/Dec.622(XXVIII), 30-31 January 2017, para. 8. AU, Draft Withdrawal Strategy Document, 12 January 2017 (on file with the author). Note that Benin, Botswana, Burkina Faso, Cabo Verde, Cote d'Ivoire, The Gambia, Lesotho, Liberia, Madagascar, Malawi, Mozambique, Nigeria, Senegal, Tanzania, Tunisia and Zambia entered formal reservations to the decision. For a preliminary analysis of the AU's decision on collective withdrawal, see Patryk I. Labuda, 'The African Union's Collective Withdrawal from the ICC: Does Bad Law make for Good Politics?', *EJIL Talk*, 15 February 2017.

should be understood as the latest step in a series of threats intended to push the ASP and the Security Council to agree to a list of far-reaching demands, including that sitting Heads of State should receive protection from prosecution and trial at the ICC.[23]

I. The Scope of this Study

Against the backdrop of the ongoing tensions between the AU and the ICC, this study sets out to investigate how the Court and other relevant actors have responded to the AU's concerns about the prosecution and trial of sitting Heads of State and Government. In light of the prosecution of al-Bashir and the trials of Kenyatta and Ruto, the AU has repeatedly warned (1) that the ICC undermines the promotion of peace in African states, (2) that sitting Heads of State enjoy immunity from arrest under international law and (3) that the ICC negatively affects the ability of African leaders to exercise their official responsibilities. This study examines how the Court, the Security Council and the ASP have addressed these concerns and assesses whether they have done so in accordance with the Rome Statute and international law more generally.

The overarching research question that this study seeks to answer is as follows:

How have the Court, the Security Council and the Assembly of States Parties responded to the AU's concerns about the prosecution and trial of sitting Heads of State and Government by the ICC, and to what extent are these responses based on a convincing interpretation of the Court's legal framework and international law more generally?

[23] AU, Draft Withdrawal Strategy Document, 12 January 2017 (on file with the author), p. 10. The AU's position on the prosecution of sitting Heads of State is explicated in the Withdrawal Strategy in the following manner: 'while being a Head of State or Government such will not exempt them from criminal liability for international crimes allegedly perpetuated, *prosecution should not be instituted until the Head of State or Government or anyone entitled to act as such, has left office* - in accordance with domestic and customary international law' (emphasis added). See also AU Assembly, Decision on the International Criminal Court, Assembly/AU/Dec.590(XXVI), 30-31 January 2016, para. 10(IV); AU Assembly, Decision on the International Criminal Court, Assembly/AU/Dec.616 (XXVII), 17-18 July 2016, para. 5.

The first part of the research question highlights that this study is concerned with one particular aspect of the ICC's Africa problem. Without denying the importance of other concerns that the AU and individual African states have voiced about the Court, this study focusses solely on the AU's concerns about the prosecution and trial of sitting Heads of State. Most importantly perhaps, this study does not address the question of perceived selectivity, which has obtained a lot of attention in other contributions.[24]

The first part of the research question further confines the scope of this study to the formal responses of a specific groups of actors: the Court, the Security Council and the ASP. Only the official decisions and statements that have been adopted by these actors in response to the AU's concerns are examined here. The reason for this is that the Court, the Security Council and the ASP are the only actors that have a legal authority under the Rome Statute to act on the AU's concerns. This legal authority lies, first and foremost, with the different organs of the Court, which are tasked to interpret and apply its legal framework (Article 34), and especially with the Court's judges and the Office of the Prosecutor (OTP).[25] In addition, the Security Council is authorized under the Statute to influence the Court's decision-making by referring situations for possible investigation to the Prosecutor (Article 13(b)) and by

[24] The ICC has so far opened investigations in 10 situations of which 9 in Africa (Uganda, the DRC, the Central African Republic, Darfur, Ivory Coast, Kenya, Libya, Mali and a second one in the CAR). On 27 January 2016, PTC I authorized the Prosecutor to proceed with her first investigation outside of Africa, for crimes allegedly committed in Georgia. Note that the Prosecutor has also opened preliminary examinations in Afghanistan, Burundi, Colombia, Gabon, Guinea, Iraq/UK, Nigeria, Palestine, Registered Vessels of Comoros, Greece and Cambodia, and Ukraine, and has completed preliminary examinations in Honduras, Venezuela and the Republic of Korea. On the ICC's alleged Africa bias, see for example, Kai Ambos, 'Expanding the Focus of the 'African Criminal Court'', in William A. Schabas, Yvonne McDermott, and Niamh Hayes (eds.), *Ashgate Research Companion to International Criminal Law: Critical perspectives* (Aldershot: Ashgate, 2012), pp. 499-530; Margaret M. deGuzman, 'Is the ICC Targeting Africa Inappropriately?: A Moral, Legal and Sociological Assessment', in Richard H. Steinberg (eds.), *Contemporary Issues Facing the International Criminal Court* (Leiden: Brill Nijhoff, 2016), pp. 333-337; Dire Tladi, 'The African Union and the International Criminal Court: The Battle for the Soul of International Law' (2009) 34 *South African Yearbook of International Law* 57-69.

[25] Article 34 determines that 'the Court shall be composed of the following organs: (a) The Presidency; (b) An Appeals Division, a Trial Division and a Pre-Trial Division; (c) The Office of the Prosecutor; (d) The Registry'.

deferring an investigation or prosecution for a renewable period of twelve months (Article 16). Finally, the Assembly of States Parties, which is created by the Statute as a body separate from the Court (Article 112 and Article 34), possesses various powers, of which the right to initiate amendments to the Statute is the most far-reaching one (Article 121).

The second part of the research question specifies the main objective of this study, which is to assess whether the official responses to the AU's concerns are based on a convincing interpretation of the ICC's legal framework.[26] This study does not chart the forces and interests that shape the AU's decision-making, nor does it seek to review the moral implications of the AU's objections against the ICC. Instead, it focusses on the legal questions that the AU's campaign has brought up about the prosecution and trial of sitting Heads of State. These questions, which are introduced below, require detailed analysis because they play an important role in the ongoing debate on the ICC's relationship with Africa in particular and in the study of international law more generally. An additional reason why the decisions and statements that have been adopted in response to the AU's concerns demand the interest of scholars, policymakers and legal professionals is that they have significant implications for future decision-making on legally complex and politically sensitive issues like the immunity of sitting Heads of State and the coordination between the interests of peace and prosecution.

In light of the objectives of this study, three sets of legal questions particularly require attention. Firstly, the AU's peace concerns and repeated requests to the Security Council to defer the prosecution of African presidents have raised questions about the exercise (and non-exercise) of the Council's power to defer the Court's proceedings under Article 16 of the Rome Statute. Under what conditions can the Security Council suspend an investigation or prosecution? Is this only allowed when the Court's involvement in a situation amounts to a threat to the peace in the meaning of Chapter VII of the UN Charter,[27] or can the Council also issue a deferral in reference to other developments like an ongoing peace process or a terrorist attack? Furthermore, are there other ways within the legal framework of the

[26] The question of what makes some interpretations more convincing than others is discussed in part III of this chapter.

[27] The Charter of the United Nations, 26 June 1945, UN Treaty Series, 59 Stat. 1031, Treaty Series 993, p. 1153 (entered into force 24 October 1945).

Court to mediate the interests of peace and prosecution? Can the Prosecutor or perhaps the UN General Assembly play a role in this regard? These questions are particularly relevant in light of the AU's pending proposal to amend the Rome Statute in such a way that the UN General Assembly will be able to defer an investigation or prosecution when the Security Council fails to decide on a deferral request within six months of its receipt.[28]

Secondly, the immunity of sitting Heads of State and in particular al-Bashir's immunity from arrest demands attention. Article 27(2) of the Statute provides that immunities 'shall not bar the Court from exercising its jurisdiction over a person'. With this provision, the parties to the Statute authorized the Court to deviate from the prevailing rule in international law that sitting Heads of State enjoy personal immunity from criminal prosecution outside of their own country. According to the AU, however, al-Bashir still possesses immunity from arrest, because Sudan is not a party to the Statute and al-Bashir is only subject to the Court's jurisdiction on the basis of a Security Council referral.[29] In support, the AU has pointed to Article 98(1) of the Statute, which stresses that the Court 'may not proceed with a request for surrender or assistance' when this requires a state to violate its international obligations to accord state or diplomatic immunities to the officials of other states. These and connected arguments have raised intricate questions about the nature and scope of immunities and about the different ways in which immunities can be waived or removed. The significance of these questions lies in the pending proceedings on al-Bashir's immunity, and more generally in the fact that the immunity of state officials remains one of the most hotly contested topics in international law today.[30]

Finally, the unprecedented situation of having a sitting Head and a Deputy Head of State on trial in the Kenyan cases has brought up difficult questions about balancing the requirement of the accused

[28] UN Treaties Collection (C.N.851.2009.TREATIES-10), South Africa: Proposal of Amendment, 18 November 2009.

[29] UNSC, Resolution 1593, 31 March 2005.

[30] Note that the topic of 'immunity of state officials from foreign criminal jurisdiction' has been on the agenda of the International Law Commission (ILC) since 2007. For an overview of the ILC's consideration of this topic, see ILC Special Rapporteur Hernández, Fourth report on the immunity of State officials from foreign criminal jurisdiction, A/CN.4/686, 29 May 2015, paras. 1-14.

to be present at trial with the official responsibilities of state leaders. As part of its opposition against the trials of Kenyatta and Ruto, the AU urged the Court back in 2013 to allow the Kenyan President and Deputy President to choose which sessions of their trials they wished to attend. These 'excusal requests' prompted questions about whether the Trial Chamber has any discretion to waive the obligation of the accused to be present at trial. Is the Trial Chamber permitted to excuse an accused from having to attend trial hearings, and if so, under what conditions can an excusal be granted? The special treatment that the AU demanded for Kenyatta and Ruto also sparked questions about the first sub-paragraph of Article 27(1) of the Statute, which stipulates that the Statute 'shall apply equally to all persons without any distinction based on official capacity'.[31] If the Trial Chamber enjoys a certain level of discretion to waive the duty of the accused to be present at trial, can the accused also be excused because of his or her demanding functions as (Deputy) Head of State? In other words, is there a legal basis for treating sitting Heads of State differently than another accused? These questions demand attention seeing that the ICC may be confronted with them again in future cases and especially because they touch on the heart of the AU's problems with the ICC.

The remainder of this introductory chapter explains how the relevant questions about the prosecution and trial of sitting Heads of State are examined in this study. In order to clarify the premises, or 'legal method', upon which this research builds, I will explain my views on (1) the structure of the ICC's legal framework and (2) the applicable rules of interpretation for the Rome Statute.[32] Firstly, part

[31] The equal treatment principle is also embedded in Article 21(3). The relevant part of this provision states that the interpretation and application of the Court's applicable law must be 'without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status'.

[32] For present purposes, a legal method is understood to mean the consistent application of a conceptual apparatus to a certain sets of legal questions. On different 'methods' in international law, see the various contributions to the following symposium on methods in international law, and especially the introductory and concluding remarks of its conveners: Steven R. Ratner and Anne-Marie Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93 *American Journal of International Law* 291-302; Anne-Marie Slaughter and Steven R. Ratner, 'The Method is the Message' (1999) 93 *American Journal of International Law* 410-423.

I will discuss the role and hierarchy of the different sources of applicable law that are embedded in Article 21 of the Statute. What are the sources of law that the Court and other relevant actors are supposed to apply and to what extent is there an order of precedence between these sources? Secondly, part II will turn attention to the interpretation of the Rome Statute, and will discuss what makes some interpretations, and in most cases one particular interpretation, more convincing than others in view of the rules of interpretation that are provided in the Rome Statute and in the Vienna Convention on the Law of Treaties (Vienna Convention or VCLT).[33] What are the applicable rules of interpretation and how should these rules be interpreted? Finally, part III will explain the organization of this study and will provide a short overview of what is to be expected in the following chapters.

II. The ICC's Legal Framework

The Rome Statute includes a detailed list of sources of applicable law. This list is laid down in Article 21 and forms the core of the ICC's legal framework. All legal arguments that are presented by participants before the Court and all official decisions, statements and policies that are adopted by the Court's organs should be based on the sources that are enumerated in this provision:

> 1. The Court shall apply:
>
> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
>
> b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
>
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally

[33] The Vienna Convention on the Law of Treaties, 23 May 1969, UN Treaty Series, Volume 1155, p. 33 (entered into force on 27 January 1980).

> exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
>
> 2. The Court may apply principles and rules of law as interpreted in its previous decisions.
>
> 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

In a historical sense, Article 21 forms the first codification of the sources of international criminal law.[34] None of the statutes of the preceding international criminal tribunals contained a provision specifying applicable law. The judges of the Nuremberg and Tokyo Tribunals, as well as the *ad hoc* Tribunals for Yugoslavia and Rwanda did not receive detailed instructions on the sources that they would have to apply, and the relative weight that they would have to attach to them.[35] With the inclusion of Article 21, the drafters of the Rome Statute intended to limit this judicial discretion in order to increase legal certainty.[36]

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[34] Margaret deGuzman, 'Article 21 - Applicable Law', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Oxford: Hart Publishing, 2008, 2nd edition), p. 703.

[35] For a comparison between Article 21 of the Rome Statute and the statutes of other international criminal tribunals, see Gilbert Bitti, 'Article 21 and the Hierarchy of Sources of Law before the ICC', in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), pp. 411-413.

[36] On the drafting history of Article 21, see Ida Caracciolo, 'Applicable Law', in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (Rome: Editrice il Sirente, 2000), pp. 212-224; William A. Schabas, *A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), pp. 383-385. Some commentators have argued that the inclusion of the specific list of sources in Article 21 is an 'improvement of international criminal law', which helps to provide 'procedural certainty to the parties and participants'. See, for example, Bitti, 'Article 21', p. 413. Other commentators have argued that there are also downsides to this limitation of judicial discretion. See, for example, Alain Pellet, 'Applicable Law', in in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), pp. 1051-1084. More generally, on the alleged mistrust by states in international judges, in the context of the Rome Statute, see David Hunt, 'The International Criminal Court

In some ways, Article 21 resembles Article 38(1) of the Statute of the International Court of Justice (ICJ).[37] Apart from academic writings, which are not mentioned in Article 21, the Rome Statute includes the same sources of law as the ICJ Statute. Both refer, although in different terms, to international treaties, international custom, judicial decisions and general principles of law recognized by civilized nations. They differ fundamentally, however, in the sense that Article 21 defines an order of precedence between these sources, while Article 38(1) of the ICJ Statute places them on an equal footing.[38]

There are three levels of hierarchy within the ICC's legal framework.[39] First of all, Article 21(1) draws a distinction between the 'internal sources of law' that are mentioned in sub-paragraph (a) which the Court shall apply 'in the first place' and the 'external sources of law' that are specified in sub-paragraphs (b) and (c), to which the Court shall only resort if the internal sources fail to yield a solution. Secondly, among the internal sources of law, there exists a hierarchical relationship between the Statute,

- High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges' (2004) 2 *Journal of International Criminal Justice* 56-70; Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 *European Journal of International Law* 163.

[37] Article 38(1) of the ICJ Statute provides that 'the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.

[38] The only exception under Article 38(1) concerns academic writings and judicial decisions, which sub-paragraph (d) defines 'as subsidiary means for the determination of rules of law'.

[39] The existence of a hierarchy of sources in Article 21 is widely accepted in the literature, see for example Bitti, 'Article 21', p. 411; deGuzman, 'Article 21', p. 702; Gudrun Hochmayr, 'Applicable Law in Practice and Theory - Interpreting Article 21 of the ICC Statute' (2014) 12 *Journal of International Criminal Justice* 655; Pellet, 'Applicable law', p. 1076; Schabas, 'Commentary', p. 385.

the Elements of Crimes and the Rules of Procedure and Evidence (Rules or RPE).[40] This relationship does not follow from the text of Article 21(1)(a) itself, but derives from other provisions in the Statute.[41] Finally, Article 21(3) includes a standard of review which calls for an interpretation and application of the ICC's legal framework which is consistent with 'internationally recognized human rights'. This standard makes these rights in a certain sense superior to all the other sources of law that are listed in Article 21.[42]

In the following sections, I introduce these three hierarchical levels and explain how I understand the relative weight of the sources of law that together form the ICC's legal framework. This brief evaluation of the applicable sources of law forms the first pillar of the legal method that this study employs in analysing the different responses to the AU's concerns about the prosecution and trial of sitting Heads of State. To clarify my position on the applicable law of the ICC, I follow the distinction and order that Article 21 draws between: (A) internal sources of law, (B) external sources of law, (C) the Court's jurisprudence and (D) internationally recognized human rights.

A. Internal sources of law: Article 21(1)(a)

Under general international law, the Rome Statute can be understood as a multilateral treaty of a 'particular type' with certain 'special legal characteristics'.[43] It forms a conventional agreement between its parties, but at the same time it also has a constitutive character in the sense that the Statute serves to create a new subject of international law with its own legal personality (Article 4(1)).[44] One of the

[40] The Rules of Procedure and Evidence and the Elements of Crimes were adopted during the first session of the ASP, see Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (ICC-ASP/1/3 and Corr.1), parts II.A and II.B.

[41] See the discussion below at II.

[42] Pellet, 'Applicable law', p. 1077.

[43] *Legality of the use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, [1996] ICJ Rep 66, para. 19; *Certain Expenses of the United Nations*, Advisory Opinion, [1962] ICJ Rep 151, at 157.

[44] *Ibid.*

consequences of this constitutive character is that the Statute takes priority within the Court's own legal order over all other (internal and external) sources of applicable law.

The constitutive instruments of some international organisations seek to entrench precedence over other treaties. For example, Article 103 of the UN Charter provides that 'in the event of a conflict between the obligations of the Members of the [UN] under the present Charter and their obligations under any other international agreement their obligations under the present Charter shall prevail'.[45] The Rome Statute does not include such a provision and does not prohibit its states parties to conclude other and possibly incompatible treaties in the field of international criminal justice.[46] Still, the Statute does oblige the Court to give priority to the Statute over all other internal and external sources of law in the exercise of the Court's own jurisdiction. As stated in Article 21(1), the Court shall apply 'in the first place' the Statute and other internal sources of law, and 'in the second place' and 'where appropriate' treaties and the principles and rules of international law, and 'failing that' general principles of law.

[45] The majority view in the academic discourse is that Article 103 covers treaty and customary international law, and that the Council is, under certain conditions, authorized to derogate from treaty and customary international law when acting under Chapter VII. See generally Andreas Paulus and Johann Leiβ, 'Article 103', in Bruno Simma, Daniel-Erasmus Khan, George Nolte and Andreas Paulus (eds.), *The Charter of the United Nations - A Commentary* (Oxford: Oxford University Press, 2016, Third Edition), pp. 2132-2133. For further discussion and references on Article 103, see chapter 3, part V(B) in this study.

[46] Some scholars have questioned the legality of the Amendment Protocol on the establishment of a criminal chamber of the African Court by arguing that the Rome Statute does 'not expressly allow or even imply that regional courts … [can] be conferred with jurisdiction to try international crimes that are under the jurisdiction of the ICC'. See for example Chacha Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice*, 1081. This argument is unconvincing, because there is no requirement under general international law for a court created by a multilateral treaty (the African Court on the basis of the AU Constitutive Act) to obtain the approval of another multilateral treaty (the Rome Statute) to justify its own existence. Neither the Rome Statute nor any other treaty has an 'exclusionary character in terms of having totally occupied the field for purposes of treaty-making'. See Vincent O. Nmehielle, '"Saddling" the New African Regional Human Rights Court with International Criminal Jurisdiction: Innovative, Obstructive, Expedient?' (2014) 7 *African Journal of Legal Studies* 24-25; Knottnerus and de Volder, 'African Criminal Court', pp. 383-384.

Apart from the Statute, Article 21(1), sub-paragraph (a) mentions two other instruments of internal law: the Elements of Crimes and the Rules.[47] The text of sub-paragraph (a) suggests that the Statute and these other instruments are of equal importance. Yet, other provisions in the Statute create a hierarchical relationship in favour of the Statute. Firstly, Article 9(1) specifies that the function of the Elements is to assist the Court in 'the interpretation and application' of the crimes that are listed in Articles 5-8, and Article 9(3) adds that the Elements 'shall be consistent with this Statute'. It remains controversial whether the Elements are binding for the Court's judges, but it is clear that the Statute takes priority over the Elements.[48] This means that the Court may in certain situations have to deviate from the Elements in the interpretation and application of the crimes. Secondly, Article 51(4) dictates that the Rules and amendments thereto 'shall be consistent' with the Statute, and Article 51(5) further determines that in 'the event of conflict … the Statute shall prevail'.[49] As the ASP stated in its

[47] Note that the Statute also creates other legal instruments of an internal nature which are not specifically listed in Article 21, in particular the Regulations of the Court (Article 52). As created by the Statute, the Regulations are part of the internal law of the Court, and must be applied in the 'first place' (in the meaning of Article 21(1)(a)). Note that Article 52(1) specifies that the Regulations should be compatible with both the Statute and the RPE, creating a hierarchical relationship between the Statute and the RPE on the one hand and the Regulations on the other. The relationship between the Regulations and other internal instruments has not been regulated in the Statute. This means that in the event of conflict judges will have to find solutions based on general principles of law such as *lex specialis derogate legi generali* and *lex posterior derogat priori*. As observed by Schabas, 'Commentary', p. 387. The Regulations of the Court were adopted by the judges of the Court on 26 May 2004, Official documents of the International Criminal Court (ICC-BD/01-01-04).

[48] The majority of PTC I ruled in the al-Bashir case that 'the Elements of Crimes ... must be applied unless the competent Chamber finds an irreconcilable contradiction between these documents on the one hand and the Statute on the other'. *Al-Bashir* (ICC-02/05-01/09-3), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 3 March 2009, paras. 128-131. Most commentators agree that the formulation of Article 9(1) shows that the Elements of Crimes do not have a binding character. For further discussion, see Leena Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court' (2010) 21 *European Journal of International Law* 563-579; Hochmayr, 'Applicable law', pp. 657-658; Pellet, 'Applicable law', pp. 1059-1062

[49] As stated by PTC I: 'it follows that a provision of the Rules cannot be interpreted in such a way as to narrow the scope of an article of the Statute'. *Situation in the Democratic Republic of the Congo* (ICC-01/04-101), Decision on the Applications for

explanatory note to the RPE, the Rules and the amendments thereto 'are an instrument for the application of the Rome Statute … to which they are subordinate in all cases'.[50]

B. External sources of law: Article 21(1)(b) and (c)

In addition to internal sources of law, Article 21(1) refers in sub-paragraph (b) to applicable treaties and principles and rules of international law and in sub-paragraph (c) to general principles of law. The wording of these provisions has sparked debate among commentators, especially on the definition of applicable treaties,[51] and on the possibility to derive general principles of law 'as appropriate' from 'the national laws of States that would normally exercise jurisdiction over the crime'.[52] For present purposes it is not necessary to engage with these discussions.[53] What should be emphasized, however, is that customary international law and other external norms are subsidiary sources of law in the sense that they can only be applied if the Court's internal law cannot provide a solution.

The Court's judges have ruled that the application of Article 21(1)(b) and (c) is subject to the condition that there exists a 'gap' in the internal law of the Court. As stated most clearly by the Pre-Trial Chamber in its decision on the arrest warrant for al-Bashir:

Participation in the Proceedings of VRS 1, VRS 2, VRS 3, VRS 4, VRS5 and VRS 6, 17 January 2006, para. 47. For further discussion on the relation between the Rules and the Statute, see chapter 4, part IV(C) in this study.

[50] The background of the explanatory note and 'the very strong stance of the ASP in favour of the Statute's supremacy' is that the ASP was unwilling 'to allow the United States to use the Rules as a tool to increase the scope of Article 98(2) ... to prevent any American citizens from being surrendered to the Court'. See Bitti, 'Article 21', p. 416.

[51] Compare for example Hochmayr, 'Applicable law', pp. 666-667 (arguing that the Court may apply all treaties relevant for 'the domain in question', including the VCLT and the UN Charter) and Pellet, 'Applicable law', p. 1088 (arguing that 'it is difficult to imagine … a situation in which the Court would have to apply a treaty other than its Statute, unless two or more States agreed to accord to some specific jurisdiction or require the application of particular principles').

[52] For a detailed analysis of the way in which Article 21(1)(c) sets out to derive general principles of law, see Pellet, 'Applicable law', pp. 1073-1075.

[53] For an overview, see Hochmayr, 'Applicable law', pp. 661-672.

> '[T]hose other sources of law provided for in [sub-]paragraphs 1(b) and 1(c) of article 21 of the Statute, can only be applied when the following two conditions are met: (i) there is a *lacuna* in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such *lacuna* cannot be filled by the application of criteria provided for in Articles 31 and 32 of the Vienna Convention on the Law of Treaties and article 21(3) of the Statute'.[54]

Until now, the Court's judges have not found many gaps in its internal law and have therefore rarely *applied* external sources of law in the meaning of Article 21.[55] Applicable treaties, rules of customary international law and general principles of law do play a significant role, however, in the *interpretation* of the Statute.[56] This 'interpretative methodology, under which the application of external law is restricted to the function of filling gaps' is convincing in light of the hierarchy that Article 21 creates between internal and external sources of law.[57]

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[54] Al-Bashir Arrest Warrant Decision (March 2009), para. 126. As cited in Schabas, 'Commentary', p. 385; Hochmayr, 'Applicable Law', p. 661. See also *Situation in the Democratic Republic of the Congo* (ICC-01/04-168), Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para. 39. On the question whether there exists a gap in the written law of the Court because the Statute does not provide for the possibility to appeal a decision of a Pre-Trial or Trial Chamber denying leave to appeal, the Appeals Chamber concluded that 'the Statute defines exhaustively the right to appeal against decision of first instance courts, namely decisions of the Pre-Trial or Trial Chambers … the lacuna postulated by the Prosecutor is inexistent'.

[55] For a discussion of the relevant jurisprudence see Bitti, 'Article 21', pp. 425-428; Hochmayr, 'Applicable Law', pp. 662-663.

[56] External sources can form part of the 'context' in which the Rome Statute should be interpreted in accordance with Articles 31(1) and 31(3)(c) of the VCLT. Furthermore, there are a number of provisions in the Statute which refer explicitly to international treaties or rules of customary international law, such as Article 13(b), Article 16 or Article 98(1). The interpretation of these provisions requires an analysis of the relevant sources of external law, and these provisions therefore indirectly require the application of the relevant sources of external law as primary rather than subsidiary sources of law in the meaning of Article 21(1).

[57] Hochmayr, 'Applicable Law', p. 662. As noted above, at fn. 38, the existence of this hierarchy of sources is generally accepted in the literature.

In the existing case law of the ICC, the Court has been hesitant to specify what a gap entails and scholars have taken different positions on how to define this legal concept. According to one commentator, a gap in the internal law of the Court can be described as 'an objective which could be inferred from the context or the object and purpose of the Statute, an objective which would not be given effect by the express provisions of the Statute or the Rules, thus obliging the judge to resort to the second or third source of law - in that order - to give effect to that objective'.[58] This position is problematic, however, as it presumes that each and every objective in the Statute ought to be given effect. It ignores that certain gaps may have been intentionally included in the written law of the Court.

In my opinion, the better view is that the closing of gaps through the application of external law is only permissible when it can be shown that 'the incompleteness of the norms' was unintended.[59] In making this determination, the Court has to employ the applicable rules of interpretation, which are further discussed below.[60] The Court should only resort to applicable treaties, international custom or general principles of law, when it establishes that a certain objective should be given effect, because it otherwise leaves a gap in the application of the internal law of the Court that cannot be reconciled in good faith with the ordinary meaning that should be given to the terms of the relevant provisions when considered in their context and in the light of the Statute's object and purpose.[61]

C. The Court's jurisprudence: Article 21(2)

Pursuant to Article 21(2) the Court '*may apply* principles and rules of law as interpreted in its previous decisions' (emphasis added). In contrast to the internal and external sources of law which the Court *shall apply* under Article 21(1), the permissive formulation of Article 21(2) indicates that the Court is not bound by its own jurisprudence. The Court is authorized to base its interpretations on earlier decisions,

[58] Bitti, 'Article 21', p. 426; Grover, 'A Call to Arms', pp. 549-550.

[59] Hochmayr, 'Applicable Law', p. 663.

[60] For further discussion on the relevant rules of interpretation, see below at III.

[61] An example is the absence of a standard of interpretation in the ICC's legal framework, which has to be filled by Articles 31 and 32 of the VCLT, as discussed below at III. For another possible example of a gap, in the context of the ICC's immunity regime, see chapter 3.

but is not obliged to do so.[62] The case law of the Court can in this sense be characterized as 'extra-hierarchical' and constitutes an aid for interpretation rather than a binding source of law.[63] As confirmed by the Court's judges: 'the usage of the verb "may" in Article 21(2) of the Statute provides the Chamber with the discretion as to whether to follow previous [rulings]. Consequently, the provision rejects the *stare decisis* doctrine'.[64]

As a subsidiary tool for the purposes of interpretation, Article 21(2) does not make a distinction between the jurisprudence of the Pre-Trial, Trial or Appeals Chamber of the Court. In the absence of a hierarchical formulation between the decisions of the different chambers, 'the case law of the Appeals Chamber does not seem to be placed on a higher level than the case law of other Chambers of the Court'.[65] Based on the text of Article 21(2) the Court's judges appear free to deviate from the views of the Appeals Chamber and may adopt an interpretation of a Pre-Trial or Trial Chamber that has been rejected by the Appeals Chamber *in an earlier and different case*.[66]

The general rule that the jurisprudence of the different chambers is equally (un)important is subject, however, to one important condition. A Pre-Trial Chamber or Trial Chamber is bound by a ruling of the Appeals Chamber that is issued *in the same case*. This does not necessarily follow from the

[62] Note that while text of Article 21(2) only applies to the case law of the ICC, it does not deprive the Court of the authority to consider principles and rules of law from the case law of other judicial bodies for the purposes of the application of the external sources of law that are mentioned in Article 21(1) and 21(3), or for the interpretation of the Court's internal or external law. For a discussion of the use of other case law by the Court, see Schabas, 'Commentary', p. 396.

[63] Pellet, 'Applicable law', p. 1078.

[64] *Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-77) Decision on the 'Prosecution's Application for leave to Appeal the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (ICC-01/09-02/11-48), 2 May 2011, para. 23. As cited in Hochmayr, 'Applicable law', p. 673.

[65] Bitti, 'Article 21', p. 423.

[66] Note that in practice there is a tendency before the ICC, and other international criminal tribunals, to treat the *ratio decidendi* of rulings of the Appeals Chamber in earlier cases as binding. This tendency is partly the product of a desire to bring consistency and predictability to the interpretation and application of the relevant international legal frameworks. In the abstract, these objectives merit approval. However, it must be stressed that these objectives do not in any way bind judges to earlier decisions. For a discussion of the relevant jurisprudence, see Schabas, 'Commentary', p. 395.

text of Article 21, but can be inferred from the provisions that regulate the appeal proceedings. If a ruling of the Appeals Chamber could be rejected by the Pre-Trial or Trial Chamber in the same case, the Appeals Chamber's power to reverse or amend decisions of these chambers, as envisioned in Articles 81-85, would become ineffective.[67] In order to give effect to these provisions, rulings of the Appeals Chamber can function as a binding source of law for the purposes of a specific case.

D. Internationally recognized human rights: Article 21(3)

The last and probably most controversial element of the ICC's applicable law is the reference in Article 21(3) to 'internationally recognized human rights'. This provision introduces 'a substantive hierarchy' in the Court's legal framework by ordering the Court to interpret and apply all internal and external law in consistency with an undefined category of human rights.[68] While the preparatory works indicate that the drafters spent little or no thought to the relationship between applicable human rights law and the Rome Statute, the formulation of Article 21(3) leaves no doubt that this category forms a standard of review against which all applicable law, including the Statute, should be tested.[69] This means that when there are several possible interpretations of the Statute, the Court must choose an interpretation that is consistent with the relevant human rights. Furthermore, the Court is prohibited to apply its internal or external law in a manner that is not in accordance with these rights.[70]

In a general sense, the Statute's commitment to the protection of human rights is admirable. What makes Article 21(3) controversial, however, is that the Statute does not define the scope of this additional source of law. It remains uncertain what rights are covered by Article 21(3) and to what extent

[67] Moreover, if an interpretation of the Appeals Chamber could be overturned in the same case, the Appeals Chamber would not be able to provide an 'immediate solution' in the meaning of Article 82(1)(d).

[68] Several commentators speak in this regard of a 'super-legality'. As defined by Pellet, 'Applicable law', pp. 1080-1081.

[69] 'In terms of hierarchy of applicable sources of law … little or no thought was given to the relationship between internationally recognized human rights and the Rome Statute. Ironically, the drafting of Article 21 was motivated by the principle of legality and the desire to limit judicial discretion in the interpretation and application of the Rome Statute'. As observed by Grover, 'A Call to Arms', p. 559.

[70] Hochmayr, 'Applicable law', pp. 673-674.

this provision can serve as a basis to create new procedural remedies or to overturn the Court's internal law. These and related issues continue to spark considerable debate among commentators.[71] It goes beyond the scope of this study to take a position in this debate. Yet, it is safe to say that there are limits to what Article 21(3) can be used for. Ultimately, the Statute remains the primary source of law under the Court's legal framework. Moreover, most human rights are not absolute. It is widely accepted that their enjoyment can be limited when there is an 'objective and reasonable justification'.[72]

III. The Applicable Rules of Interpretation

In analysing the AU's campaign against the prosecution and trial of sitting Heads of State, the main objective of this study is to assess whether the responses of the Court, the Security Council and the ASP to the AU are based on a convincing interpretation of the ICC's legal framework and international law more generally. The reason for speaking of a 'convincing' interpretation, rather than a 'right' or 'accurate' one, is that the process of legal interpretation should, in my view, not be understood as 'an act of cognition of a pre-existing truth'.[73] Unlike classical legal positivism, I do not share the idea that there exists an objective process of interpretation that an interpreter can follow to arrive at the legally correct interpretation. Finding a single interpretation may well be the purpose of a 'standard of interpretation',[74] but there does not exist a 'neutral, external standpoint' from which the meaning of a

[71] Compare for example Bitti, 'Article 21', pp. 433-444; Grover, 'A Call to Arms', pp. 558-563; Hochmayr, 'Applicable law', pp. 673-678; and Schabas, 'Commentary', pp. 397-400.

[72] A similar argument with respect to non-discrimination can be found in *Ruto and Sang (*ICC-01/09-01/11-1186), Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*, 18 February 2014 para. 60. In this decision the Trial Chamber concluded, *inter alia*, that Rule 134*quater* does not violate the prohibition on adverse distinction that is included in Article 21(3), because there would be an 'objective and reasonable justification'. For further discussion on this decision, see chapter 4, part IV(B) in this study.

[73] Jörg Kammerhofer and Jean D'Aspremont, *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University Press, 2014), p. 6.

[74] A standard of interpretation can be defined as a self-contained system of rules that directs the process of interpretation in a given context. The governing principles on interpretation that are embedded in the VCLT can be considered a standard of

legal text can be objectively determined.[75] Interpretation always entails an act of will, or as Hans Kelsen put it, a 'choice'.[76]

While sceptical of any claims of objectivity, I should immediately add that legal interpretation does not allow for an unlimited set of choices.[77] There are limits to how interpretation can shape and construct the meaning of a particular legal text like the Rome Statute. These limits derive from the text itself and from applicable rules that guide the process of interpretation in a specific context, such as the interpretative rules that are embedded in the Vienna Convention. Based on these and other interpretative rules, there cannot be a right or accurate interpretation, because there is no way to interpret and apply such rules in an objective manner. In an epistemological sense, the application of a standard of interpretation does not enable an interpreter to step out of the hermeneutic circle: the meaning of a text as a whole can only be determined by reference to its individual parts, and one's understanding of each individual part is constructed by reference to the whole. Yet, as a binding source of law, applicable rules of interpretation do form an external standard that can be used to scrutinize a chosen interpretation. At

interpretation for treaties concluded after the entry into force of the VCLT. Arguably, the purpose of Articles 31 and 32 of the VCLT is to establish '*one* meaning as *the* legally correct interpretation'. As explained by André de Hoogh, 'although not specifically laid down in the text of articles 31-32, an inference may be made that 'to confirm the meaning' under article 32 is only possible if there is just the one'. André de Hoogh, 'Toolbox, Straitjacket, or Normative Framework? - The Interpretation of Article 31 of the Vienna Convention on the Law of Treaties', in *Een kwestie van grensoverschrijding, Liber amicorum P.E.L. Janssen* (Nijmegen: Wolf Legal Publishers, 2009), p. 148. In reference to ILC, Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission* 1966, vol. II, p. 219-220, para. 8. (hereafter: ILC Commentary 1966).

[75] Gleider I. Hernández, 'Interpretation', in Jörg Kammerhofer and Jean D'Aspremont, *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University Press, 2014), p. 319.

[76] Hans Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1967), pp. 82-83. As cited by Hernandez, 'Interpretation', p. 320.

[77] 'Although the indeterminacy of legal language is in many respects presumed, it does not allow for unlimited choice in how interpretation shapes and constructs the meaning of a text. Within that indeterminacy comes a measure of determinacy'. *Ibid.*, p. 321.

the end of the day, these rules make some interpretations and in most cases one particular interpretation more convincing than others.

A. The identification of the applicable rules of interpretation

Most commentators on the ICC confine their discussion of the applicable rules of interpretation by stating that the Rome Statute, as an international treaty, is subject to the 1969 Vienna Convention on the Law of Treaties.[78] In a similar vein, the Appeals Chamber has stated, without giving further explanation, that 'the interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention'. [79] There is, however, a problem with this statement. It is not necessarily true that an international treaty like the Rome Statute has to be interpreted in accordance with the provisions of the Vienna Convention. Articles 31 and 32 of the Convention are widely considered rules of customary international law, but they are not rules of *jus cogens*.[80] Strictly speaking, the Vienna Convention 'is nothing more than a multilateral treaty' and is not hierarchically superior to other treaties.[81]

[78] For example, Bitti argues that the Appeals Chamber 'stated the obvious' when it concluded that the Statute is a treaty and that its interpretation is governed by Articles 31 and 32 of the VCLT. Bitti, 'Applicable Law', p. 426.

[79] Judgment on Extraordinary Review, para. 33. While the ICTY and ICTR Statutes are technically not treaties, both tribunals have held that the interpretative rules of the Vienna Convention are relevant and applicable to their work. See for example *Prosecutor v. Duško Tadić* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 18. For further discussion, see William A. Schabas, 'Interpreting the Statutes of the Ad Hoc Tribunals', in Lal Chand Vohrah et. all (ed.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Leiden: Brill Nijhoff, 2003), pp. 847-888.

[80] See for example *LaGrand (Germany v. United States of America)*, Judgment, [2001] ICJ Rep 466, paras. 99 and 101. Further note that an identical text on interpretation is included in Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, *UN Yearbook* (1986), p. 1006 (not yet entered into force).

[81] Hernandez, 'Interpretation', p. 325. In reference to Kammerhofer, Hernandez points out that Articles 31 and 32 of the Vienna Convention 'were never intended to be the 'source-law' for all treaties to which they apply'. For further discussion see Jörg Kammerhofer, 'Systematic Integration, Legal Theory and the ILC' (2010) 13 *Finnish Yearbook of International law 2008* 354-355.

Consequently, the drafters of a treaty, like the Rome Statute, are free to opt for other means of interpretation than the rules that are embedded in the Vienna Convention.[82]

Within the Rome Statute there are at least two provisions that offer specific rules for the interpretation of the Court's legal framework. Firstly, Article 21(3) directs the Court to interpret all internal and external legal instruments consistent with internationally recognized human rights. As discussed, this provision entails a standard of review that applies to the interpretation and application of every provision of the Statute, but without giving detailed instructions on how to realize this standard. Secondly, Article 22(2) obliges the Court to construe the crimes that are listed in Articles 5-8 in a strict manner and determines that in case of ambiguity the crimes have to be interpreted in favour of the suspect or accused (*in dubio pro reo*).[83] Unlike Article 21(3), this rule of strict construction only applies to the interpretation of the crimes and not to other provisions.[84]

Given that Articles 21(3) and 22(2) are part of the Statute, the specific rules of interpretation that are included in these provisions should be applied 'in the first place' under Article 21(1). Articles 21(3) and 22(2) do not, however, form a self-contained system of rules that guides the interpretation of all provisions of the Statute. In the absence of such a standard of interpretation, the Court must resort to the Vienna Convention, either as an applicable treaty or alternatively as rules of customary international law in the meaning of Article 21(1)(B).[85]

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[82] Yves Le Bouthillier, 'Article 32 - Supplementary means of interpretation', in Olivier Corten and Pierre Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford: Oxford University Press, 2011), p. 846.

[83] Article 22(2) states that 'the definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted'.

[84] For further discussion on the interpretation of the crimes in relation to Article 22(2) as well as Article 21(3), see Grover, 'A Call to Arms', 552-563.

[85] Most commentators fail to explain how the Vienna Convention fits into the structure of the ICC's legal framework that is embedded in Article 21 of the Statute. A notable exception is Hochmayr, who argues that the Vienna Convention is an applicable treaty in the meaning of Article 21(1)(b), while adding that these rules may also arise as rules of customary international law. Hochmayr, 'Applicable law', p. 667.

As a subsidiary source of law that fills an unintended gap in the Court's internal law, the interpretative rules of the Vienna Convention bind the Court for the interpretation of the Statute.[86] Article 31 and 32 of the Convention do not, on the other hand, regulate the interpretation of other applicable sources of law that are part of the ICC's legal framework, including the Rules and the Elements of Crimes.[87] The interpretation of these and other legal instruments may be subject to similar rules of interpretation. Yet, the Vienna Convention does not apply to these sources, because the Convention clearly states in Article 2(1)(a) that the Convention only applies to the interpretation of

[86] To be clear, this hierarchy does not imply that Articles 31 and 32 of the Vienna Convention should only be applied when a strict literal interpretation leaves doubt about the meaning of a certain provision. Under Article 22(2) there is a rule of strict construction for the interpretation of the crimes, but the Statute does not contain a similar rule for other provisions. According to Dov Jacobs, however, 'the existence of the principle of legality justifies the non-application of the VCLT' to the interpretation of the Rome Statute. Jacobs notes that there are two ways of arguing for this position. One is that the rules of interpretation contained in the Vienna Convention only come into play in the absence of specific rules of interpretation contained in the Rome Statute. A second and in his view 'more innovative way of approaching the problem is through the functional duality of the statutes of international criminal tribunals'. Jacobs has argued that 'when a judge applies the ICC Statute in criminal proceedings … he is not applying it qua treaty, but … as the internal instrument for the functioning of the Court, which therefore does not automatically warrant, as usually claimed, the reference to the VCLT'. See Dov Jacobs, 'International Criminal Law', in Jörg Kammerhofer and Jean D'Aspremont, *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University Press, 2014), pp. 468-470. In a general sense, I agree with Jacobs' first argument. The Vienna Convention only applies to the extent that the Statute does not provide specific rules of interpretation. Based on the text of Article 22(2), and in the absence of other special rules of interpretation, I disagree, however, that the VCLT does not apply as a subsidiary source of law in the interpretation of other provisions of the Statute. The Statute does not provide special rules of interpretation outside the context of Article 21(3) and the strict construction of the crimes. Moreover, the Statute does not support Jacobs' proposed distinction between the two different functions of the Court. Unless it can be shown that there are special rules of interpretation for international criminal tribunals under customary international law there is no legal basis for Jacobs' claim that the principle of legality, rather than the VCLT, functions as the standard of interpretation for the Rome Statute.

[87] The reason for this is that the Rules and the Elements of Crimes cannot be considered treaties in the meaning of Article 2(1)(a) of the VCLT.

treaties, and thus not to internal regulations like the Rules and the Elements of Crimes.[88] For present purposes, however, I shall not advert to examine the specific rules for the interpretation of other sources than the Statute. As most of the legal questions that are discussed in this study concern the interpretation of provisions of the Statute, I limit my analysis here to Articles 31 and 32 of the Vienna Convention, which provide for the general rule of interpretation and supplementary means of interpretation.[89]

B. The interpretation of Articles 31 and 32 of the Vienna Convention

Article 31 contains four paragraphs that together form the general rule for the interpretation of treaties that are subject to the Vienna Convention. The first paragraph of this provision establishes the starting point for the process of interpretation, which is to give priority to the text of the treaty by using good

[88] For example, it has been argued that Resolutions of the UN Security Council are subject to the same rules of interpretation. On the interpretation of Security Council Resolutions, the ICJ has stated that the rules of the VCLT, 'may provide guidance', but that 'differences between Security Council Resolutions and treaties mean that the interpretation of Security Council Resolutions also require that other factors be taken into account'. The ICJ has further noted that 'the interpretation of Security Council Resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other Resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given Resolutions'. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion, [2010] ICJ Rep 403, para. 94. For further discussion on the interpretation of Security Council Resolutions in the context of Article 13(b) of the Statute, see chapter 3, part V.

[89] Another provision that can be relevant for the interpretation of the Rome Statute is Article 33 of the Vienna Convention, which concerns the interpretation of treaties authenticated in two or more languages. Article 128 of the Rome Statute provides that the Arabic, Chinese, English, French, Russian and Spanish text are all equally authentic. In accordance with Article 33(3) VCLT, the terms of the Statute 'are presumed to have the same meaning in each authentic text'. In this study I work on the basis of the same presumption and only refer to the English version (unless the literature or jurisprudence indicates that there may be a difference of meaning between the different versions). The presumption of Article 33(3) is rebutted when 'a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove'. Article 33(4) VCLT determines that if this happens, 'the meaning which best reconciles the texts having regard to the object and purpose of the treaty shall be adopted'.

faith, the ordinary meaning of the terms, the context of the terms, and the treaty's object and purpose.[90] The second paragraph specifies that 'context' includes the text of the treaty, the preamble and possible annexes, as well as agreements between the parties that were adopted at the time when the treaty was concluded (*ex tunc)*.[91] The third paragraph refers to subsequent agreements, subsequent practice and relevant rules of international law that apply between the parties at the moment of interpretation (*ex nunc*).[92] They can together be qualified as the 'external context' of the treaty.[93] Finally, the last paragraph of Article 31 states that if the parties so intended a term shall be given a special meaning.[94]

The four paragraphs of Article 31 are the product of a compromise between the supporters of different schools of interpretation, and in particular between the textual, historical and teleological methods of interpretation.[95] The formulations that are used in Article 31 show that the different interpretative elements are of equal value in the sense that all means of interpretation that are enunciated in this provision 'shall' be applied as part of the general rule interpretation. There is no binding hierarchy

[90] 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' (Article 31, paragraph one).

[91] 'The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty' (Article 31, paragraph two).

[92] 'There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties' (Article 31, paragraph three).

[93] That is, if 'the entire context were represented as concentric circles'. Jean-Marc Sorel and Valérie Boré Eveno, 'Article 31 - General rule of interpretation', in Olivier Corten and Pierre Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford: Oxford University Press, 2011), p. 808. Note that the elements of Article 31(3) are not considered as part of the context of the terms under Article 31(1), which is specified in Article 31(2). This follows from the wording of Article 31(3) which states that the relevant external elements shall be taken into account 'together with the context'.

[94] 'A special meaning shall be given to a term if it is established that the parties so intended' (Article 31, paragraph four).

[95] On the drafting history of Article 31, see generally Sorel and Boré Eveno, 'Article 31', pp. 806-817.

in Article 31.[96] The application of the different means of interpretation is understood to be a 'single combined operation': all the elements as they are present in a given case are to be thrown 'into the crucible', and it is their 'interaction' that generates 'the legally relevant interpretation'.[97]

While not creating a binding hierarchy, Article 31 does establish a 'logical order' for the application of the different means of interpretation.[98] This order is based on the idea that 'the text must be presumed to be the authentic expression of the intentions of the parties'.[99] In accordance with the first paragraph of Article 31, the first element that is to be considered in the process of interpretation is the ordinary meaning of the terms of the treaty in their context. This textual interpretation is followed by a consideration of the treaty's object and purpose, relevant external elements and the possibility of a special meaning.[100] This particular order guides the interpretation of all treaties that are subject to the Vienna Convention, including the relevant provisions of the Rome Statute.

i. The meaning and relative weight of the different elements in Article 31

Article 31(1) requires the ordinary meaning 'to be given' to the terms of a treaty. The use of this specific formulation signals that ordinary meaning is a relative concept, and that the terms of a treaty may have

[96] The ILC also agreed 'that the article, when read as a whole, cannot properly be regarded as laying down a legal hierarchy of norms for the interpretation of treaties'. ILC Commentary 1966, p. 220, para. 9.

[97] *Ibid.,* p. 219, para. 8

[98] Logic dictates that elements can only be taken up one at a time. On this point the ILC stated: 'The elements of interpretation in the article have in the nature of things to be arranged in some order. But it was considerations of logic, not any obligatory legal hierarchy, which guided the Commission in arriving at the arrangement proposed in the article'. *Ibid,* p. 220, para. 9.

[99] *Ibid.,* p. 220, para. 11.

[100] The ICJ has repeatedly confirmed that text should be the starting point of the interpretation process. Before the adoption of Article 31, it stated that 'the first duty of a tribunal which is called upon to interpret and apply provisions of a treaty is to endeavour to give effect to them in their natural and ordinary meaning in the context of which they occur. If the relevant words in their natural and ordinary meaning make sense in their context that is an end of the matter'. *Competence of the General Assembly for the Admission of a State to the United Nations,* Advisory Opinion, [1949] ICJ Rep 1950, at 8. For further discussion on the relevant jurisprudence of the ICJ, see Sorel and Boré Eveno, 'Article 31', pp. 818-819.

multiple original meanings (*ex tunc*).[101] The task for an interpreter is to choose in 'good faith'[102] between these meanings at the time of the interpretation.[103] The first tool that an interpreter should employ in choosing between the different meanings is the context of the specific terms.[104] The legally relevant meaning of a certain provision of the Rome Statute or other treaty cannot be determined 'in the abstract', but requires a consideration of the entire text of the treaty and other elements that are specified in paragraph two.[105] This is necessary in order to avoid inconsistencies between the terms of the relevant provision and its different surroundings.

[101] This interpretation of ordinary meaning is confirmed by Article 31(4) which envisions the possibility that the drafters have given a 'special meaning to a term' beyond its ordinary meaning. The appropriate reference point for identifying possible ordinary meanings is the moment that the treaty was adopted (*ex tunc*). This follows from the different wording of Article 31(1) in comparison to Article 31(3) which explicitly allows for the consideration of later developments up to the moment of interpretation (*ex nunc*).

[102] Good faith or *bona fides* has been described by the ICJ as 'one of the basic principles governing the creation and performance of legal obligations'. *Nuclear Tests (Australia v. France)*, Judgment, [1974] ICJ Report 268, para. 46. This notion prevails through the whole process of interpretation, but has limited 'normative quality'. Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Brill Nijhoff, 2009), p. 426. In this respect, the ICC's Appeals Chamber stated that it shall not 'advert to the definition of good faith, save to mention that it is linked to what follows and that is the wording of the Statute'. Judgment on Extraordinary Review, para. 33.

[103] As the ICJ stated in the Namibia Advisory Opinion: 'an internal instrument has to be interpreted and applied within the framework of the entire legal system prevailing *at the time of the interpretation*' (emphasis added). *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep 16, para. 53.

[104] If the context is revised, through amendments to the treaty, the contemporary context applies, because amendments can be considered an 'updated' expression of the intentions of the parties.

[105] ILC Commentary 1966, p. 221, para. 12. In discussing the general rule of interpretation, the ICC's Appeals Chamber has stated that 'the context of a given legislative provision is … the particular sub-section of the law read as a whole in conjunction with the section of enactment in its entirety'. Judgment on Extraordinary Review, para. 33. In light of the logical order that is established by Article 31, the consideration of the immediate context of a provision may be sufficient before going to the treaty's object and purpose. For the complete process of interpretation, however, the Appeals Chamber's definition of context is too narrow. Article 31(2) makes clear that the context of the treaty's terms not only includes their (sub-) section, but also

The next step in the interpretative process is to examine the treaty's object and purpose, which may be found, among other places, in the preamble of the treaty.[106] Article 31 speaks of object and purpose in the singular, but a treaty often has more than one aim or intention. This holds true for the Rome Statute as well. In reference to the fourth,[107] fifth[108] and eleventh paragraph of the Preamble of the Statute,[109] some commentators have claimed that the Statute's object and purpose is limited to the prevention of the crimes that are part of the Court's jurisdiction by ending impunity for these crimes.[110] Yet, the Preamble, other relevant provisions of the Statute and the treaty's drafting history also mention other significant objectives such as 'the peace, security and well-being of the world',[111] the

other parts of the treaty, the preamble, annexes and interpretative agreements that the parties adopted at the time that the treaty was concluded.

[106] In principle, all the different means of interpretation that are enunciated in Article 31 can be used to determine the treaty's object and purpose. Subject to the conditions for the application of Article 32, the drafting history may be considered as well. The ICC's Appeals Chamber has stated that the 'objects [of a particular section] may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty'. This suggests a distinction between the meaning of object and purpose, whereby the notion of an object is attached to a specific provision or particular section, and the notion of purpose to the treaty as a whole. Judgment on Extraordinary Review, para. 33. This distinction finds no support in the wording or drafting history of Article 31(1) and is therefore not adopted in this study.

[107] 'Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation' (Preamble, fourth paragraph).

[108] 'Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes' (Preamble, fifth paragraph).

[109] 'Resolved to guarantee lasting respect for and the enforcement of international justice' (Preamble, eleventh paragraph).

[110] Luigi Condorelli and Santiago Villalpando argue, for example, that 'from the clear words of the Preamble of the Statute, it seems that the goals of putting an end to the impunity for the perpetrators of [international] crimes is the main reason for the creation of the ICC'. Luigi Condorelli and Santiago Villalpando, 'Referral and Deferral by the Security Council', in Antonio Cassese, Paola Gaeta and John Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), p. 631.

[111] 'Recognizing that such grave crimes threaten the peace, security and well-being of the world' (Preamble, third paragraph).

complementarity of national criminal jurisdictions,[112] fair trial standards,[113] the rights of victims[114] and the purposes and principles of the UN Charter.[115] It is 'in the light of' these different aims, which together form the Court's object and purpose, that the terms of the Statute should be interpreted.[116] The Court and other relevant actors have to do so without going beyond 'the original intentions of the parties as expressed in the text'.[117] The logical order of Article 31 implies that the treaty's object and purpose is to be considered within the scope of the ordinary meaning of the terms of the treaty and their context.

As part of the external context of a treaty, sub-paragraphs (a) and (b) of Article 31(3) determine that any subsequent agreement between the parties and relevant subsequent practice 'shall be taken into account' in the process of interpretation.[118] These two 'authentic means of interpretation' are different from the contextual elements that are enumerated in paragraph 2, in the sense that they are external and

[112] 'Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions' (Preamble, tenth paragraph).

[113] Fair trial standards are embedded in numerous provisions of the Statute, including in the general principles of criminal law (Articles 22-33), the rights of persons during an investigation (Article 55) and the rights of the accused (Article 67).

[114] 'Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity' (Preamble, second paragraph). The rights of victims are embedded in numerous provisions, including provisions on the protection of victims and their participation in the proceedings (Article 68) and reparation (Article 75).

[115] 'Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations' (Preamble, seventh paragraph).

[116] Whereas the treaty shall be interpreted *in accordance with* the ordinary meaning of the terms of the treaty in their context, the treaty should (only) be interpreted *in the light of* its object and purpose. As noted by De Hoogh 'for all intents and purposes the Commission could have quite easily stipulated that a treaty ought to be interpreted *in accordance with* the ordinary meaning of terms in context and its object and purpose'. Arguably, the decision not to adopt this alternative formulation was deliberate and confirms the Commission's choice for the primacy of the text as the authentic expression of the intentions of the parties. De Hoogh, 'Interpretation Article 31', p. 156.

[117] ILC Commentary 1966, p. 218, para. 2.

[118] One relevant subsequent agreement is the Relationship Agreement between the United Nations and the International Criminal Court. The complete text of this Agreement can be found in UNGA, A/58/874, 20 August 2004.

originate after the conclusion of the treaty.[119] The conditions for the application of these extrinsic elements are complex and cannot be fully considered here.[120] In a general sense, it should be stressed, however, that their application is subject to the logical order that is inscribed in the general rule of interpretation.[121] This implies that a subsequent agreement or relevant subsequent practice are more likely used to confirm than to assert the legally relevant meaning of a treaty provision.[122]

In addition to subsequent agreements and subsequent practice, sub-paragraph (c) of Article 31(3) calls for the consideration of 'any relevant rules of international law applicable in the relations between the parties'.[123] This provision envisages the process of interpretation against the whole background of international law, including other applicable treaties, customary international law and general principles of law. In light of the logical order of the general rule of interpretation, Article 31(3)(c) does not, however, require an interpretation that is in conformity with international law. As one of the ICC's Trial Chambers has explained: 'Article 31(3)(c) does not say that a treaty must be given a subservient standing relative to broader international law'.[124] It only obliges 'the interpreter to keep

[119] *Ibid.*, p. 222, para. 15.

[120] Note that the topic of 'subsequent agreements and subsequent practice in relation to interpretation of treaties' has been on the agenda of the ILC since 2013. For the outline of the ILC's consideration of this topic, see ILC Special Rapporteur Nolte, First report on subsequent agreements and subsequent practice in relation to treaty interpretation, A/CN.4/660, 19 March 2013.

[121] Indeed, there is no obligation under Article 31(3) to make sure that the chosen interpretation is in accordance with subsequent agreements and relevant subsequent practice, as the provision only states that these additional means of interpretation shall be 'taken into account'.

[122] Sorel and Boré Eveno, 'Article 31', pp. 825-826 ('subsequent interpretative agreements [and] subsequent practice … seem more in the order of confirmation rather than assertion'). Further note that subsequent agreements and subsequent practice cannot be used to circumvent established procedures in the treaty on the amendment of its provisions.

[123] For a detailed analysis of Article 31(3)(c) of the Vienna Convention, see Panos Merkouris, *Article 31(3)(c) VCLT and the principle of systemic integration: normative shadows in Plato's cave* (Leiden: Brill Nijhof, 2015).

[124] *Ruto and Sang* (ICC-01/09-01/11-777), Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, 18 June 2013, para. 102.

broader international law in view' in order to assess whether the parties truly intended 'to displace broader international law in a particular respect'.[125]

Finally, Article 31(4) recognizes that the parties may have intended to give 'a special meaning' to a certain term. The word 'special' implies that this provision goes beyond the apparent ordinary meaning of a term under Article 31(1). As the last element of the general rule of interpretation, Article 31(4) functions as a default mechanism and only becomes relevant when the other means of interpretation lead to an outcome that contradicts the intended special meaning of a term.[126] This should be understood as part of the compromise that Article 31 forms between the textual, historical and teleological methods of interpretation. Whereas the general rule of interpretation as a whole clearly prioritizes textual interpretation, the last paragraph of Article 31 and subsequently Article 32 reintegrate the original intentions of the parties in the process of interpretation.[127]

ii. The supplementary means of interpretation in Article 32

Along with the primary means of interpretation in Article 31, the Vienna Convention allows for the use of 'supplementary means of interpretation' under Article 32.[128] As explained by the ILC's commentary, Article 32 does not 'provide for alternative, autonomous, means of interpretation but only for means to

[125] *Ibid.*

[126] In most cases, a special meaning can be established through the other means of interpretation. For example, a special meaning can be derived from a particular provision on the use of terms (as part of context under paragraph 2) or on the basis of a subsequent interpretive agreement (paragraph 3). The Rome Statute contains one specific provision on the use of terms: Article 102 defines the meaning of the terms surrender and assistance for the purpose of the Statute. In addition, specific definitions of terms are included, *inter alia*, in Articles 5-8 (the crimes), Article 1 of the Rules and in numerous provisions of the Elements of Crimes. The existence of a provision on the use of terms does not necessarily provide for a burden of proof for the use of Article 31(4) VCLT. For further discussion see Sorel and Boré Eveno, 'Article 31', pp. 829-830.

[127] *Ibid.*, p. 829.

[128] Article 32 VCLT reads that: 'recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable'.

aid an interpretation governed by the principles contained' in Article 31.[129] For the purpose of the interpretation of the Rome Statute, supplementary means especially include the preparatory works of the Statute. These can be found in the official records of the Rome Conference and in the official reports on other stages of the drafting process, such as the meetings of the ILC, the Ad Hoc Committee and the Preparatory Committee.[130]

In a general sense, the usefulness of supplementary means of interpretation depends on the outcome of the first stage of the interpretation process which is guided by Article 31. If the primary means of interpretation firmly establish the meaning of a treaty provision, the supplementary means can only be used *to confirm* this meaning. Alternatively, sub-paragraphs (a) and (b) of Article 32 recognize that supplementary means may also be used *to determine* the meaning of a provision, but only when the primary means of interpretation leave its meaning 'ambiguous or obscure' or lead to 'a result which is manifestly absurd or unreasonable'. In effect, Article 32 is based on the same presumption as Article 31, namely that the text reflects the authentic expression of the intentions of the parties and that it is only in exceptional cases that an interpreter should resort to other sources than the text to identify the intended meaning of a provision.

IV. Organization of this Study

This study takes a thematic approach in analysing the responses to the AU's concerns about the prosecution and trial of sitting Heads of State. In addition to the introduction and the conclusion, it

[129] ILC Commentary 1996, p. 223, paras. 19-20. Note that Article 32 does not provide an exhaustive list of supplementary means and does not try to define the scope of preparatory works. On the drafting history of Article 32, see generally Le Bouthillier, 'Article 32', pp. 842-842.

[130] See in particular ILC, Report of the International Law Commission on the work of its forty-sixth session (2 May-22 July 1994), A/49/10, Supplement No. 10; Report of the Ad Hoc Committee on the Establishment of an International Criminal Court in UNGA, A/50/PV.22,1995, 6 September 1995; Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN.Doc. A/CONF.183/2, 14 April 1998; Rome Conference, Official Records, A/CONF.183/13 (Vol.2), 15 June-17 July 1998.

consists of three core chapters. Each of these chapters addresses one of the three sets of concerns that the AU has voiced about the prosecution of al-Bashir and the trials of Kenyatta and Ruto. In analysing the responses to these concerns, the overarching goal of this study is to assess whether the relevant decisions and statements of the Court, the Security Council and the ASP are based on a convincing interpretation of the ICC's legal framework and international law more generally. As explained above, this assessment is made in view of the different sources of law that are embedded in Article 21 of the Statute and the applicable rules of interpretation.

Chapter 2 explores the responses of the Security Council, the Prosecutor and the ASP to the AU's claim that the prosecution and trial of sitting Heads of State undermines the interests of peace. The first half of the chapter examines the legal scope of the Security Council's power to defer under Article 16 and analyses the Council's decision-making on the AU's deferral bids for al-Bashir, Kenyatta and Ruto. The second half of the chapter considers the responses of the Prosecutor and the ASP to the AU's peace concerns. Several states and commentators have suggested that the Prosecutor holds the discretion under Article 53 to cease an investigation or prosecution when the Court's continued involvement obstructs the interests of peace. In addition, the AU has argued that the ASP should amend Article 16 and empower the UN General Assembly to defer an investigation or prosecution when the Security Council fails to act upon a deferral request within six months of its receipt. How have the Prosecutor and the ASP responded to these suggestions and is there a legal basis for these 'alternative deferral mechanisms' under the Court's current legal framework and international law more generally?

Chapter 3 focusses on the AU's claim that al-Bashir continues to enjoy immunity from arrest as sitting Head of State. In response to al-Bashir's visits to African states that are a party to the Rome Statute, the Pre-Trial Chamber has ruled that states parties cannot invoke Article 98(1) to refuse cooperation with his arrest. The chapter examines the different arguments that the Court's judges have made in this regard and assesses whether they interpreted the relevant provisions of the Statute and other rules of international law in a convincing manner. Based on a detailed review of the Court's jurisprudence and the doctrinal debate on the immunities of sitting Heads of State, the chapter questions

whether the Court's judges have adequately explained why states parties cannot rely on Article 98(1) in the case of al-Bashir.

Chapter 4 turns to the requests of Kenya and the AU to excuse Kenyatta and Ruto from continuous presence at trial because of their official responsibilities as sitting Head and Deputy Head of State. In first instance these requests were mainly a concern for the Court's judges. Yet, after the Appeals Chamber ordered the Trial Chamber to limit excusals to a minimum, presence at trial also became a subject on the political agenda of the ASP. During the ASP's annual meeting in late 2013, the AU successfully pressured states parties to develop a special excusal regime for sitting (deputy) Heads of State by amending the rules on presence at trial. This chapter examines the relevant decisions of the Court's judges and the ASP. How did they respond to the AU's concerns about Kenyatta's and Ruto's required presence at trial and are their decisions based on a convincing interpretation of the Court's legal framework?

Finally, by way of conclusion, chapter 5 highlights the most controversial legal aspects of the responses of the Court, the Security Council and the ASP to the AU's concerns about the prosecution and trial of sitting Heads of State. In answering the overarching research question, this chapter emphasizes that the ongoing tension between the AU and the ICC is not just a matter of power politics and self-interested leaders, but that there are complex legal issues at play between the AU and the ICC. These issues will continue to require attention from commentators, and in some cases demand (immediate) consideration by the Court, the Security Council and the ASP.

Chapter 2

Peace, Prosecution and Deferral[1]

The prosecution of international crimes is often evaluated on the basis of its perceived effects on peace, stability and the rule of law.[2] In contrast to the idea that there exists a moral duty or a legal obligation to prosecute the alleged perpetrators of international crimes, states and commentators generally focus on the consequences and instrumental purposes of prosecution when they defend or criticize the pursuit of international criminal justice. On the one hand, those who argue in favour of the prosecution of international crimes portray judicial interventions as an essential tool for peace-building, deterrence and the promotion of democracy. On the other hand, those who are critical of international criminal prosecution caution that the involvement of an international court like the ICC can also have a negative impact on peace negotiations or post-conflict reconstruction.

In the course of its campaign against the ICC, the African Union has repeatedly made use of this second set of arguments in warning that the prosecution and trial of sitting Heads of State undermines the promotion of peace. This warning is a notable example of an effect-based assessment of international criminal prosecution. According to the AU, the Court has frustrated peace negotiations in Sudan by prosecuting President Omar al-Bashir and has undermined post-conflict reconstruction in Kenya by

[1] Parts of this chapter draw on Abel S. Knottnerus, 'The Security Council and the International Criminal Court: The Unsolved Puzzle of Article 16' (2014) 61 *Netherlands International Law Review* 195-224; Abel S. Knottnerus, 'The Growing Rift between Africa and the International Criminal Court: The Curious (Im)possibility of a Security Council Deferral' *(*2013) 26 *Hague Yearbook of International Law* 34-56; Abel S. Knottnerus, 'The AU, the ICC and the Prosecution of African Presidents', in Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (eds.), *Africa and the ICC: Perceptions of Justice* (Cambridge: Cambridge University Press, 2016), pp. 152-184.

[2] See generally Leslie Vinjamuri, 'The ICC and the Politics of Peace and Justice', in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), pp. 13-29; Leslie Vinjamuri, 'Deterrence, Democracy, and the Pursuit of International Justice during Conflict' (2010) 24 *Ethics & International Affairs* 191-211. Vinjamuri observed that the establishment of the ICTY 'unleashed a discussion about the effects of justice on peace' and that in this discussion an 'unofficial consensus' emerged that 'justice could be legitimately evaluated on the basis of its effects'.

continuing the trials against Uhuru Kenyatta and William Ruto after their election as President and Deputy President of Kenya. More specifically, the AU has contended that the Prosecutor's decision to indict al-Bashir complicated the peace process in Darfur,[3] and that the cases against Kenyatta and Ruto endangered the fragile stability of Kenya after the post-election violence of 2007.[4] Based on these 'peace concerns', the AU has repeatedly asked the UN Security Council to defer the prosecution of al-Bashir and to suspend the cases against Kenyatta and Ruto under Article 16 of the Rome Statute.[5]

From a legal point of view, the AU's peace concerns and related deferral requests have raised questions about the scope of the Security Council's power to defer the Court's proceedings. Under what conditions can the Council suspend an investigation or prosecution? Is this only allowed when the Court's involvement in a situation amounts to a threat to the peace in the meaning of Chapter VII of the UN Charter, or can the Council also issue a deferral in reference to other developments like an ongoing peace process or a terrorist attack? Furthermore, are there any alternative ways within the legal

[3] For the initial response to the Prosecutor's application for an arrest warrant against al-Bashir, see AUPSC, Communiqué, PSC/MIN/Comm(CXLII), 21 July 2008, para. 9. The High-Level Panel on Darfur which the AUPSC established to examine the situation explained that the AU's concerns about the prosecution of al-Bashir also stretched beyond Darfur, including the 'broader political process in Sudan, the implementation of the Comprehensive Peace Agreement [concluded in 2005], the holding of general elections [scheduled for April 2010], as well as the Referendum on self-determination for Southern Sudan scheduled for January 2011'. AU, Report of the African Union High-Level Panel on Darfur, PSC/AHG/2(CCVII), 29 October 2009, para. 241.

[4] The strongest expression of these concerns is found in AU Assembly, Decision on Africa's Relationship with the ICC, Ext/Assembly/AU/Dec.1(Oct.2013), 11-12 October 2013, paras. 6 and 7. The Assembly argued in this decision that the trials of Kenyatta and Ruto 'will distract and prevent them from fulfilling their constitutional responsibilities, including national and regional security affairs', and expressed the concern 'that the ongoing process before the ICC may pose a threat to the full implementation of the National Accord of 2008 and prevent the process of addressing the challenges leading to the Post-Election Violence'.

[5] Note that in July 2011, the AU also requested a deferral for the prosecution of Colonel Gaddafi, because his prosecution seriously complicated 'the efforts aimed at finding a negotiated political solution to the crisis in Libya'. See AU Assembly, Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/Dec.366(XVII), 30 June-1 July 2011, para. 6. This request was never formally debated by the Council and is therefore not further considered in this chapter.

framework of the Court to mediate the interests of peace and prosecution? Can the Prosecutor or the UN General Assembly play a role in this regard, or does the Council have an exclusive power to defer an investigation or prosecution in the interests of peace?

This chapter examines these questions in relation to the responses of the Security Council, the Prosecutor and the Assembly of States Parties to the AU's peace concerns. Part I reconstructs the drafting process of Article 16 and investigates the legal scope of the Council's power to defer under the Rome Statute. Why was this provision included in the Statute and under what conditions is the Council allowed to issue a deferral? Part II discusses the responses of the Council to the AU's deferral requests for al-Bashir, Kenyatta and Ruto. How did the members of the Council decide on these requests and to what extent are their views based on a convincing interpretation of Article 16? Parts III and IV analyse the responses of the Prosecutor and the ASP to the AU's peace concerns. Several commentators and state actors have suggested that the Prosecutor holds the discretion to cease an investigation or prosecution when the Court's continued involvement obstructs the interests of peace. In addition, the AU has argued that the ASP should amend Article 16 and empower the UN General Assembly to defer an investigation or prosecution when the Security Council fails to act upon a deferral request within six months of its receipt. How have the Prosecutor and the ASP responded to these suggestions and is there a legal basis for these 'alternative deferral mechanisms' under the Court's legal framework and international law more generally? Finally, part V summarizes the different responses to the AU's peace concerns and concludes this chapter with a brief discussion on the current functioning of the ICC's deferral regime.

I. The Deferral Power of the Security Council

During the negotiations on the Rome Statute, the relationship between the Security Council and the ICC was one of the most controversial issues. Many delegations agreed that the Council could help to enforce

the Court's decisions,[6] and should have the power to extend the Court's jurisdiction to non-parties.[7] The drafters held strongly different views, however, on how to deal with potential conflicts between the judicial functions of the ICC and the Council's primary responsibility for the maintenance of international peace and security under the UN Charter (Article 24).[8] Some states, including the five permanent members of the Council (P5), envisioned the ICC as an instrument that the Council could employ to address a threat to the peace, breach of the peace or act of aggression in the sense of Article 39 of the Charter.[9] Yet, many other delegations countered this idea and argued that the ICC required institutional autonomy and that its decision-making should be independent from the Council's political considerations.[10]

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[6] The idea that the Council can help to enforce the Court's decisions is reflected in Article 87(5)(b) and especially Article 87(7) of the Statute. Article 87(7) provides that 'where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, *where the Security Council referred the matter to the Court*, to the Security Council' (emphasis added). The Council's envisaged role in enforcing the Court's decisions is thus limited under the Rome Statute to situations which were referred by the Security Council under Article 13(b) of the Statute. Note that any power that the Council has to help enforce the Court's decisions does not derive from the Rome Statute, but from the UN Charter. This power is not limited to Security Council referrals. The Council can take measures against states or individuals under the UN Charter with the aim to help enforce any decision of the Court.

[7] The 'positive' power to refer a situation to the ICC is included in Article 13(b) of the Statute. For further discussion, see part V(C) in chapter 3.

[8] 'In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf' (Article 24(1) of the UN Charter).

[9] 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security' (Article 39 of the UN Charter).

[10] Based on these different views, Deborah Verduzco observed that states envisioned at least three different 'methods of interaction' between the Security Council and the ICC: 'a 'functionalist' logic portraying the ICC as a 'tool' of the Council; a contrasting vision, stressing judicial independence and the need for institutional autonomy; and one envisaging the Council as executive enforcement organ for the ICC, thereby supporting the functionality of the Rome Statute'. Deborah Ruiz Verduzco,

A. The drafting process of Article 16

In one of the first drafts of the ICC's statute, the International Law Commission (ILC) proposed to resolve this matter in the same way as Article 12(1) of the Charter prioritizes the agenda of the Council over the responsibilities of the UN General Assembly.[11] Under this proposal, no prosecution could be commenced when the Council would be dealing with a situation as a threat to the peace under Chapter VII of the Charter, unless the Council would decide otherwise.[12] According to the ILC, this construction would carefully safeguard the impartiality of the Court's judicial proceedings, because it would not give a simple veto to the Council over the initiation of prosecutions, but would require concrete actions on its behalf.[13] Moreover, prosecutions could be commenced as soon as the Council would have ended its actions under Chapter VII.[14]

During the negotiations on the draft statute in the Ad Hoc Committee (1995), the ILC's proposal was warmly welcomed by the P5.[15] Other states, however, proved more critical. A first group of states concurred with the P5 that the draft provision rightfully recognized the Council's primary responsibility

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'The Relationship between the ICC and the United Nations Security Council', in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), pp. 31-35.

[11] The commentary to Article 23(3) of the ILC Draft Statute stated that it 'prevents a prosecution from being commenced, except in accordance with a decision of the Security Council, in relation to a situation with respect to which action under Chapter VII … is actually being taken by the Council. It is an acknowledgement of the priority given by Article 12 of the Charter, as well as for the need for coordination between the Court and the Council in such cases'. ILC, Report of the International Law Commission on the work of its forty-sixth session (2 May-22 July 1994), A/49/10, Supplement No. 10, p. 45, para. 12. Article 12(1) of the UN Charter provides that: 'while the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests'.

[12] Note that Article 23(3) of the ILC Draft Statute only spoke of 'prosecution' and not, like the current formulation of Article 16, about 'investigation or prosecution'.

[13] ILC Report 1994, p. 45, at 12.

[14] *Ibid.*

[15] Morten Bergsmo and Jelena Pejić, 'Article 16 - Deferral of Investigation or Prosecution', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Oxford: Hart Publishing, 2008, 2nd edition), p. 596.

for the maintenance of international peace and security, but warned that its wording was too vague. These states called for criteria to determine when a situation was 'being dealt with' by the Council, for further specification of what a threat to the peace means in this context and to 'expressly limit the application of the paragraph to situations in which the Council has taken action with respect to a particular situation'.[16] A second and quite large group of states took a more principled position and declined the ILC's proposal for the reason that 'the judicial functions of the Court should not be subordinated to the action of a political body' and because this provision would enable the Council to paralyze the Court by keeping a situation on its agenda.[17]

After several proposals failed to bring the different views closer together,[18] a breakthrough came into sight when Singapore suggested 'to stand the concept on its head' by allowing the Council to defer prosecutions after adopting an affirmative Resolution to that effect.[19] In addition to what later became known as the 'Singapore compromise', Canada spearheaded the idea to include a twelve month renewable deferral period in the provision and Costa Rica proposed that deferral requests would have to

[16] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court in UNGA, A/50/PV.22,1995, para. 126.

[17] *Ibid.,* para. 125. This concern was also noted in the ILC Report 1994, p. 45, at 13 (stating that 'several members of the Commission took the view that [Article 23(3)] was undesirable, on the basis that the processes of the statute should not be prevented from operating through political decisions taken in other forums'). These states further challenged 'the necessity of the provision' in light of the fact that the Council has no similar priority under Article 12(1) of the UN Charter with respect to judicial decisions rendered by the ICJ. Report Ad Hoc Committee 1995, paras. 125-126.

[18] On these proposals, see Luigi Condorelli and Santiago Villalpando, 'Referral and Deferral by the Security Council', in Antonio Cassese, Paola Gaeta and John Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), p. 645.

[19] William A. Schabas, *A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), p. 326. The Singapore proposal read that 'no investigation or prosecution may be commenced or proceeded with under this Statute where the Security Council has, acting under Chapter VII of the Charter of the [UN], given a direction to that effect'. Singapore delegation at the Preparatory Committee of the ICC, Non-Paper/WG.3/No.16, 8 August 1997.

be made by a 'formal and specific decision'.[20] Momentum grew for a deferral provision along these lines, when the United Kingdom presented its own, but almost identical, proposal in March 1998.[21]

Later that year, during the opening of the Rome Diplomatic Conference, many delegations, including most African states,[22] were still reluctant to support the inclusion of a deferral provision, because it would allow the Council to interfere with the judicial independence of the Court.[23] Yet, when France joined the UK in supporting what would become Article 16, there was really no turning back.[24] On the last day of the Rome Diplomatic Conference, the drafters agreed to include the nucleus of the Singapore compromise in the Statute to secure the establishment of the ICC.[25] There was no agreement on when or how Article 16 would have to be invoked, nor did the drafters properly discuss the practical

[20] Bergsmo and Pejić, ´Article 16 - Deferral of investigation or prosecution', p. 597.

[21] *Ibid.*

[22] See Dakar declaration on the establishment of the International Criminal Court, 6 February 1998 (stating that the ICC 'shall operate without being prejudiced by actions of the Security Council'). Note that most African states accepted the authority of the Council to refer situations to the Court, but argued that the Council should 'not be able to exercise any veto or unilaterally cause indeterminate delays to the Court's proceedings' (Sierra Leone, p. 86). See also the statements of Angola (p. 117), Benin (p. 128), Botswana (p. 118), Burkina Faso (p. 84), DRC (p.112), Gabon (p. 102), Ivory Coast (p. 74), Kenya (p. 77), Madagascar (p. 108), Morocco (p. 103), Namibia (p. 87), Niger (p. 110), Nigeria (p. 111), Senegal (p. 83), Swaziland (p. 108), Sudan (p. 126), Tanzania (p. 74), Uganda (p. 118) and Zambia (p. 93) in Rome Conference, Official Records, A/CONF.183/13 (Vol.2), 15 June-17 July 1998.

[23] Note that during the final days of the Rome Conference, a number of amendments on Article 16 were introduced and rejected. For a discussion of these amendments, see Pietro Gargiulo, 'The Controversial Relationship Between the International Criminal Court and the Security Council', in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (Rome: Editrice il Sirente, 2000), pp. 89-90; Bergsmo and Pejić, 'Article 16 - Deferral of investigation or prosecution', p. 598.

[24] Schabas, 'Commentary', p. 327.

[25] *Ibid.,* p. 328; Bergsmo and Pejić, ´Article 16 - Deferral of investigation or prosecution', p. 595. As reconstructed by Verduzco, five states abstained on the adoption of the Statute (partly) because of their opposition to Article 16: Cuba, India, Mexico, Pakistan and Sudan on behalf of the Group of Arab States. Verduzco, 'ICC and Security Council', p. 57, fn. 163.

implications of an actual deferral of the Court's proceedings.[26] To the extent that there was a common political rationale of the drafters behind this provision, it was to make sure that the negotiations on the Council's role would not obstruct the adoption of the Statute and that the Council would have a limited power to defer an investigation or prosecution.[27]

B. The legal scope of Article 16

Since the adoption of the Rome Statute, the Council's relationship with the ICC has continued to be a very controversial matter.[28] This holds true for the Council's referral power, but especially for the Council's power to defer the Court's proceedings. In the context of different deferral requests, including

[26] On the practical implications of an actual Security Council deferral, see Knottnerus, 'The Security Council and the ICC', 199-203 (especially on evidence, victims and detained indictees).

[27] In a conceptual (neo-institutionalist) sense, Article 16 can be understood as a 'collision rule', which is a rule that seeks 'a solution for the issues caused by overlapping normative regimes. As a collision rule, the aim of Article 16 is to 'couple the highly judicialized area of competence of the ICC with the political rationality of the Security Council, while also tying the politically motivated Security Council to the logic of law enforcement by prosecution'. See Kerstin Blome and Nora Markard, ' 'Contested Collisions': Conditions for a Successful Collision Management - The Example of Article 16 of the Rome Statute' (2016) 29 *Leiden Journal of International Law* 562. Another and more critical perspective understands Article 16 as an example of the 'maintenance of a particular legal democratic order', which is 'shaped by the play of power'. See Kamari M. Clarke and Sarah-Jane Koulen, 'The Legal Politics of the Article 16 Decision: The International Criminal Court, the UN Security Council and Ontologies of a Contemporary Compromise' (2014) 7 *African Journal of Legal Studies* 297-319.

[28] See generally Verduzco, 'ICC and Security Council', pp. 30-64; Jennifer Trahan, 'The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices' (2013) 24 *Criminal Law Forum* 417-473. The controversial character of this relationship is illustrated by the numerous initiatives to improve the coordination and cooperation between the Council and the ICC, including: International Peace Institute, 'The Relationship Between the ICC and the Security Council: Challenges and Opportunities', March 2013; Hemy Mistry and Deborah Verduzco (rapporteurs), 'Chatham House - International Law Meeting Summary, with Parliamentarians for Global Action - The UN Security Council and the International Criminal Court', 16 March 2012; David Kaye, 'The Council and the Court Improving Security Council Support of the International Criminal Court', 13 May 2013; Blome and Markard, 'Contested Collisions', 19-25. See also the thematic debate on the Council on its relationship with the ICC: UNSC, S/PV.6849, 17 October 2012. This issue was also addressed during the Council's debate on working methods: UNSC, S/PV.7285, 23 October 2014. For a discussion of some of the proposals on Article 16, see Knottnerus, 'The Security Council and the ICC', 220-224.

those of the AU, states and commentators have spent considerable time debating Article 16. From a legal point of view, the most relevant issue that has come up in this debate is the set of conditions under which the Council can issue a deferral. These conditions are important for the Council and the Court, because if a deferral request of the Council fails to respect conditions that are embedded in Article 16, the Court is not bound by this request under the Statute and may refuse to implement it.

While the Statute and the Rules do not expressly address this scenario, the Court has the authority to examine the validity of a deferral under the Statute. This authority follows from the general principle of *compétence de la compétence* and from Article 119(1) of the Statute which provides that 'any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court'. Depending on the stage of the proceedings, the Prosecutor or the Court's judges have the power to review whether a deferral falls within the legal scope of Article 16.

What is the legal scope of Article 16? The starting point for answering this question is the text of the provision itself, which states that:

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a Resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.[29]

[29] Note that there is no reference to Article 16 in any other provision of the Statute. There are also no related procedural provisions in the RPE. Further note that the text of Article 16 does not expressly address the practical implications of a deferral. When the Council issues a deferral it falls upon the Prosecutor and the Court's judges to answer questions about the preservation of evidence, the protection of witnesses and victims, and the continued detention of accused persons. Their answers to these questions will have to be based on the Statute, and not on the Council's Resolution. Whereas some rough guidelines for their decisions can be given with reference to the relevant provisions of the Statute and the RPE, this remains an untrodden area, which makes it difficult to predict what the practical implications of a deferral will be. Some commentators have therefore called for a detailed regulation on the practical implications of a deferral. For further discussion, see Knottnerus, 'The Security Council and the ICC', 199-203; Condorelli and Villalpando, 'Referral and Deferral by the Security Council', pp. 652-654.

Based on the applicable rules of interpretation, and especially Article 31(1) of the Vienna Convention, four conditions for the use of Article 16 can be identified in the wording and direct context of this provision.

The first condition is that a deferral should be limited to a 'period of 12 months'. The Council may decide for a shorter but not for a longer deferral period. The final sentence of Article 16 stipulates that a deferral may be extended 'under the same conditions', but this does not mean that a deferral decision continues to be effective until it is revoked by the Council. Nor does it imply that a deferral can be extended automatically. The fact that the drafters included a specific time limit in Article 16 reflects the idea that a deferral is a provisional measure rather than a permanent solution.[30] The Council therefore has to adopt a new Resolution under Chapter VII of the Charter (*i.e.*, 'under the same conditions') if it wants to continue to defer certain proceedings.[31]

Secondly, on the basis of the ordinary meaning of the term 'request', it is clear that the Council has to make an explicit 'request' to the Court not to commence or proceed with an investigation or prosecution.[32] As specified in the Relationship Agreement that was concluded between the UN and the Court in 2004, this request needs to be transmitted immediately by the Secretary-General to the President

[30] Note that under Chapter VII of the Charter a deferral can either be understood as a provisional measure in the meaning of Article 40 or as a measure not involving the use of armed force under Article 41. For further discussion, see the following section.

[31] Note that Article 16 does not contain a limitation on the number of times a deferral may be renewed. Further note, that it is not entirely clear whether the Council can allow a deferral to expire and then 'resubmit it after a certain period of time, during which the Court has resumed proceedings'. See Bergsmo and Pejić, 'Article 16 - Deferral of investigation or prosecution', p. 604.

[32] This interpretation is also confirmed by the drafting history of Article 16. As noted above, many states objected to the ILC's initial proposal on the Court's relationship with the Council, because it allowed the Council to block the Court's prosecutions by keeping situations on its agenda. The Singapore compromise was a response to this objection. The fact that the drafters included the nucleus of this proposal in the Statute confirms that they wanted the Council to take a specific decision to request a deferral, rather than keeping the situation on its agenda.

and to the Prosecutor of the ICC.[33] This condition is important, because it precludes states from claiming that the Council has implicitly deferred certain proceedings. Citing Article 16 in a Security Council Resolution, or copying the language of this provision, does not by itself constitute a valid deferral under the Statute.[34] The Council has to transmit an explicit request to the Court before an investigation or prosecution can be considered deferred.[35]

[33] Article 17(2) of the Relationship Agreement states that 'when the Security Council adopts under Chapter VII of the Charter a Resolution requesting the Court, pursuant to article 16 of the Statute, not to commence or proceed with an investigation or prosecution, this request shall immediately be transmitted by the Secretary-General to the President of the Court and the Prosecutor. The Court shall inform the Security Council through the Secretary-General of its receipt of the above request and, as appropriate, inform the Security Council through the Secretary-General of actions, if any, taken by the Court in this regard'. The complete text of the Agreement can be found in UNGA, A/58/874, 20 August 2004. For the purposes of interpretation, the Relationship Agreement functions as a subsequent agreement on the application of the treaty in the sense of Article 31(3)(a) of the VCLT.

[34] In Resolutions 1593 (Darfur referral) and 1970 (Libya referral), the Council 'recalled' Article 16 in a preambular paragraph. This reference has been interpreted by some commentators as a legal justification for the 'exemption clause' that was also included in these Resolutions. This clause excludes 'nationals, current or former officials or personnel' of non-parties from the Court's jurisdiction for acts committed while participating in operations 'established or authorized' by the Council. See, for example, Chris Gallavin, 'Prosecutorial Discretion within the ICC: Under the Pressure of Justice' (2006) 17 *Criminal Law Forum* 49; Luigi Condorelli and Annalisa Ciampi, 'Comments of the Security Council Referral of the Situation in Darfur to the ICC' (2005) 3 *Journal of International Criminal Justice* 596. As I have argued elsewhere, such a 'disguised deferral' raises the problem that the text of the Resolution does not resemble the language of Article 16. The absence of a temporal limitation in the exemption clause suggests that the Council intended to suspend the Court's jurisdiction permanently. It is therefore hard to imagine how the exemptions were ever meant to be consistent with the temporal institution of the deferral power of the Council. Moreover, because Article 16 demands that the Council makes an explicit request to the Court not to commence or proceed with an investigation or prosecution, any disguised deferral is invalid under the Statute. See Knottnerus, 'The Security Council and the ICC', 208-210. See also Dapo Akande, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC' (2012) 10 *Journal of International Criminal Justice* 308; Robert Cryer, 'Sudan, Resolution 1593, and International Criminal Justice' (2006) 19 *Leiden Journal of International Law* 208-214.

[35] Because of this requirement, the established deferral period does not commence from the day that the Council adopted the relevant Resolution, but from the day that it is received by the Court. See also Bergsmo and Pejić, 'Article 16 - Deferral of investigation or prosecution', p. 603.

Thirdly, the Council can only issue a deferral through 'a Resolution adopted under Chapter VII'. This condition connects the Council's deferral power under the Statute to the Council's primary responsibility for the maintenance of international peace and security under the UN Charter.[36] Although this was hardly discussed by the drafters,[37] the explicit reference to Chapter VII makes the lawfulness of a deferral dependent on the legal conditions that are embedded in the Charter for the adoption of a Resolution under Chapter VII. In particular, it requires the Council to determine that there is a threat to the peace in the sense of Article 39, because the Council may only act under Chapter VII if it has determined that such a threat exists. What this condition precisely entails is further discussed in the following section.

Finally, the last condition for the use of Article 16 is that the Council has to exercise its deferral power on a case-by-case basis.[38] This condition establishes two concrete limits to the scope of Article 16. First of all, the Council can only defer (the initiation of) an investigation into existing and specific events. The Council may not suspend preliminary examinations or investigations into future crimes (*i.e.*, with regard to events that have not yet taken place) and may not preclude the ICC from investigating complete categories of crimes (like torture) or categories of persons (like soldiers or sitting Heads of

[36] While under Article 21(1)(b) and (c) of the Statute the Council should only apply external law if there exists a gap in the internal law of the Court (as discussed in chapter 1), the explicit reference to the UN Charter in Article 16 requires the Court to apply the UN Charter when it interprets Article 16 as a primary rather than a subsidiary source of law in the meaning of Article 21(1).

[37] The preparatory works of the Statute suggest that the inclusion of this requirement 'was to ensure that the Council take a formal vote on a deferral in keeping with Article 27 of the UN Charter'. See Bergsmo and Pejić, 'Article 16 - Deferral of investigation or prosecution', p. 603.

[38] See Robert Cryer, 'The Security Council, Article 16 and Darfur' (2008) *Oxford Transitional Justice Working Paper Series*; Carsten Stahn, 'The Ambiguities of Security Council Resolution 1422' (2003) 14 *European Journal of International Law* 89-91; Condorelli and Villalpando, 'Referral and Deferral by the Security Council', pp. 646-647; Zsuzsanna Deen-Racsmány, 'The ICC, Peacekeepers and Resolution 1422: Will the Court Defer to the Council?' (2002) 49 *Netherlands International Law Review* 364-366; Blome and Markard, 'Contested Collisions', 20.

State). Secondly, when suspending prosecutions, the Council has to specify which individuals will benefit from the deferral.[39]

This case-by-case approach derives from the wording and the direct context of Article 16. Article 16 speaks of 'investigation or prosecution' in singular and does not use a more general term like 'proceedings'.[40] This signals that the Council may only defer individual cases that are already under consideration by the Court as an investigation or prosecution. By their legal nature, the ICC's investigations are always related to existing and specific events, whereas its prosecutions are necessarily directed to identifiable persons. A second clue is the difference in wording between Article 16, which speaks of an 'investigation or prosecution' that can be deferred by the Council, and Article 13(b), which stipulates that the Council can refer 'a situation' to the Court. This difference is 'not accidental', as pointed out by Robert Cryer.[41] It signals that while the Council cannot refer individual cases, but only situations, a deferral has to relate to individual cases and cannot cover complete situations.[42]

[39] Although some commentators have argued, especially with regard to the requested deferral for al-Bashir, that Article 16 cannot be invoked to suspend individual prosecutions, the case-by-case approach suggests that the Council is actually required to identify the concerned individuals. For a different reasoning, see Annalisa Ciampi, 'The Proceedings against President Al Bashir and the Prospects of their Suspension under Article 16 ICC Statute' (2008) 6 *Journal of International Criminal Justice* 889. According to Ciampi, Article 16 'should be read as providing for the power of the Security Council to defer 'a situation', not 'cases' pending before the Court [because otherwise] cases brought by the ICC would undergo a sort of political scrutiny by the Security Council'. For the above-given reasons, I find this interpretation unconvincing.

[40] Condorelli and Villalpando, 'Referral and Deferral by the Security Council', p. 647. William A. Schabas, *An Introduction to the International Criminal Court* (New York Cambridge University Press, 2011, fourth edition), p. 185. Note that because Article 16 specifically talks about an 'investigation or prosecution', the Prosecutor may continue to take actions that precede the initiation of a formal investigation or prosecution after the Council has issued a deferral. The OTP can, for example, analyse available information, seek additional information from relevant entities and receive written or oral testimonies at the seat of the Court. See Knottnerus, 'The Security Council and the ICC', 200-201.

[41] Cryer, 'The Security Council, Article 16 and Darfur'.

[42] Further support can be found in the references that the Secretary-General and several states have made to the purported meaning of Article 16. See especially the statements of Mexico and New Zealand in UNSC, S/PV.4568, 10 July 2002; and the

In total, four conditions for a valid deferral can be derived from the wording and direct context of Article 16. A deferral has to be (1) limited to a (renewable) period of twelve months, (2) should materialize in an explicit request from the Council to the Court, (3) has to be adopted in accordance with Chapter VII of the Charter and (4) has to relate to one or more identifiable cases. What stands out about these four conditions is that they all have a strong procedural character. Article 16 gives the Council the discretion to intervene in a specific investigation or prosecution of the Court, but the wording and direct context of Article 16 do not give much guidance on the kind of circumstances that could justify a deferral.

In search for more substantive criteria for the use of Article 16, reference can perhaps be made to the Statute's object and purpose. It may, for example, be argued that a deferral has to advance the prevention of crimes, the peace, security and well-being of the world, and/or the purposes and principles of the UN Charter.[43] From a legal point of view, however, the Statute's differing aims do not limit the Council's discretion under Article 16. For that, these aims are too general and too far apart.

Subsequent practice of states parties does also not give any further indication on how Article 16 should be interpreted. The analysis of the Council's responses to the AU's deferral requests in the following sections shows that states parties have expressed very different views on the application of Article 16.[44]

The inability of these and the other primary means of interpretation leaves room for the use of the supplementary means of interpretation under Article 32 of the Vienna Convention, and especially for the preparatory works of the Statute.[45] In my opinion, the drafting history of Article 16 confirms the

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statements of Jordan, Liechtenstein, the Netherlands, New Zealand, Nigeria, the Secretary-General, Switzerland and Trinidad and Tobago (2003) in UNSC, S/PV.4772, 12 June 2003.

[43] As discussed in part III(B) of chapter 1, these and several other aims are part of Statute's object and purpose.

[44] See part II(C) in this chapter. Note that for the purpose of interpretation, the views of non-parties are irrelevant under Article 31(3)(b) of the VCLT

[45] With respect to other primary means of interpretation, the Relationship Agreement between the UN and the ICC qualifies as a subsequent agreement on the application of the treaty in the sense of Article 31(3)(a) of the Vienna Convention. However,

literal and partially contextual interpretation of this provision to the extent that the drafters did not intend to specify when the Council should use its deferral power. The drafters agreed that the Council would have this power to defer under a number of procedural conditions, but they did not discuss, let alone agree, when a deferral would be an appropriate measure. They left these kind of decisions to the Council's political deliberations, without including substantive criteria.

C. When is there a threat to the peace?

With respect to the legal scope of Article 16, there has been debate on the extent to which the Council's deferral power is limited by the reference in this provision to Chapter VII of the UN Charter. This debate has revolved around two questions: (1) what are the requirements of the Council's obligation to determine that a certain situation constitutes a threat to the peace, breach of the peace or an act of aggression in the sense of Article 39 of the Charter before taking any action under Chapter VII and (2) to what extent do these requirements limit the scope of the Council's deferral power under the Article 16 of the Statute?

These questions first came up together in relation to Security Council Resolutions 1422 and 1487, which were adopted under strong pressure from the United States in 2002 and 2003.[46] The Bush Administration was afraid that the Court would start investigating the actions of American soldiers on the territory of states parties, and therefore pushed the Council into asking the Court not to investigate or prosecute cases involving officials or personnel from non-parties to the Rome Statute with respect to operations established or authorized by the UN.[47] The adopted Resolutions claimed to be 'consistent

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the Agreement does not give any indication on how the Council should use its deferral power. Furthermore, I do not see how the consideration of 'any relevant rules of international law applicable in the relations between the parties' in the meaning of Article 31(3)(c) of the VCLT is of relevance here.

[46] The US threatened to cast a veto over all UN peacekeeping operations unless the Council would protect its military personnel from prosecution by the Court. Initially, the Council refused to endorse the American 'request', which led the US to veto a draft Resolution on the UN Stabilisation Force in Bosnia and Herzegovina. For reactions, see UNSC, S/PV.4563, 30 June 2002.

[47] UNSC, Resolution 1422, 12 July 2002, para. 1; UNSC, Resolution 1487, 12 June 2003, para. 1. The first Resolution was adopted unanimously, despite the vocal opposition of more than a hundred states. Twelve months later, this 'deferral' was

with the provisions of Article 16'. Yet, they clearly went beyond the Council's deferral power under the Statute by trying to suspend future cases, instead of an actual investigation or prosecution (which the Court had not opened).[48] The 'deferral requests' in these Resolutions thereby failed to respect the case-to-case requirement of Article 16, and were therefore invalid under the Statute.

According to some commentators, Resolutions 1422 and 1487 were not just incompatible with the Statute, but also with the UN Charter. In their view, the deferral requests in these Resolutions were invalid under both the Statute and the Charter, because the Council did not expressly invoke Article 39,[49] and acted in response to an abstract and hypothetical scenario rather than to an imminent threat to the peace.[50] They claimed that an explicit determination of a threat to the peace and the existence of an

renewed by Resolution 1487, but now with abstentions from France, Germany and Syria. UNSC, S/PV.4568, 10 July 2002; UNSC, S/PV.4572, 12 July 2002; UNSC, S/PV.4772, 12 June 2003. In 2004, the US withdrew a new deferral request, because it was unable to obtain the necessary support and was embarrassed by reports of torture committed in prisons in Iraq and Guantanamo Bay. See 'US war crimes immunity bid fails', *BBC News*, 24 June 2004. Hereafter the US took a different strategy. First, in Resolution 1497 (2004), on the deployment of peacekeeping forces in Liberia, and subsequently in Resolutions 1593 and 1970, referring the situations in Darfur and Libya to the Prosecutor, the US pressured the Council to include an exemption clause. As discussed in footnote 34, this clause should not be understood as a deferral under Article 16 or under the Charter. A more convincing interpretation is that this clause establishes a form of 'exclusive jurisdiction' for non-parties, taking the Charter rather than the Statute as a legal basis. See Schabas, 'Commentary', p. 330.

[48] See the statements of Germany, Malaysia and Samoa during the public session on Resolution 1422: UNSC, S/PV.4568, 10 July 2002. See also the statement of the Canadian Ambassador to the UN (Paul Heinbecker) after the adoption of Resolution 1422 in 'Anger at War Crimes Court Deal', *BBC News*, 13 July 2002. See also the statements of Greece (on behalf of the EU), New Zealand, the Secretary-General and Switzerland during the public session on Resolution 1487 in UNSC, S/PV.4772, 12 June 2003.

[49] See, for example, Robert Cryer and Nigel White, 'The Security Council and the International Criminal Court: Who's Feeling Threatened?' (2002) 8 *Yearbook of International Peace Operations* 169; Roberto Lavalle, 'A Vicious Storm in a Teacup: The Action by the United Nations Security Council to narrow the jurisdiction of the International Criminal Court' (2003) 14 *Criminal Law Forum* 209.

[50] See, for example, Lavalle, 'A Vicious Storm in a Teacup', 211; Mohamed El Zeidy, 'The United States Dropped the Atomic Bomb of Article 16 on the ICC Statute: Security Council Power of Deferrals and Resolution 1422' (2002) 35 *VanderBilt Journal of Transitional Law* 1532.

imminent threat are conditions for the use of the Council's powers under Chapter VII, including the power to defer the Court's proceedings. By failing to fulfil these conditions, Resolutions 1422 and 1487 would be *ultra vires* under the Statute and the Charter.[51]

Other commentators argued, however, that the Council did stay within its competence under the Charter when adopting Resolutions 1422 and 1487.[52] In their view, the Council's determination of a threat to the peace does not have to be explicit. The Council would enjoy 'an almost absolute discretion' to determine what constitutes a threat to the peace, and this could well include a 'general phenomenon', rather than a specific or imminent threat to the peace.[53]

More recently, states and commentators have also debated another aspect of the alleged requirements of Article 39 for a valid deferral, namely the relation between the Court's proceedings and the required determination of a threat to the peace by the Council. On this specific issue, Antonio Cassese wrote, already before the entry into force of the Statute, that the Council could only issue a deferral under Article 16, if it 'explicitly decides that continuation of [an] investigation or prosecution may

[51] Note that the conditions of Article 16 are only relevant to evaluate the validity of a deferral under the Statute, but not to determine the validity of a deferral under the Charter. The Council is arguably empowered under the Charter to oblige its member states to consider a certain investigation or prosecution deferred. Such a Charter-based deferral does not bind the Court if the Council does not respect the conditions of Article 16, but the obligations of UN member states under the Charter do prevail in the event of a conflict with the obligations of states under the Rome Statute to cooperate with the respective investigation or prosecution (in accordance with Article 103 of the Charter). This could potentially lead to a bizarre situation in which the Court has to ignore a Charter-based deferral (for violating the conditions of Article 16), while its states parties, including the host state, are not allowed to cooperate with the Court on these proceedings under the UN Charter. For further discussion, see Knottnerus, 'The Security Council and the ICC', 207-208. See also Dan Sarooshi, 'The Peace and Justice Paradox: The International Criminal Court and the UN Security Council', in Dominic McGoldrick, Peter J. Rowe, Eric Donnelly, *The Permanent International Criminal Court: legal and policy issues* (Oxford: Hart Publishing, 2004), pp. 108-109.

[52] Stahn, 'The Ambiguities of Security Council Resolution 1422', 98. See also Deen-Racsmány, 'The ICC, Peacekeepers and Resolution 1422', 378-380.

[53] Deen-Racsmány, 'The ICC, Peacekeepers and Resolution 1422', 380.

amount to a threat to the peace' within the meaning of Article 39.[54] In his view, Article 16 and the UN Charter demand that the identified threat derives from the Court's proceedings.

Several states have adopted this interpretation as well.[55] During the Council's deliberations on the proposed suspension of the trials of Kenyatta and Ruto in November 2013, Luxembourg stated, for example, that Article 16 was not applicable, because 'the reference to Chapter VII means that the Security Council must assume the existence of a threat to the peace *due to the very fact* of the proceedings under way in the ICC' (emphasis added).[56] In a similar vein, the UK stressed that the key question about the AU's deferral request was 'whether or not continuing with the ICC proceedings [constitutes] *in itself* a threat to international peace and security' (emphasis added).[57]

These and other views on the interpretation of Article 16 concern the requirements of Chapter VII and in particular Article 39 of the Charter for the application of the Council's deferral power under the Statute.[58] The starting point for establishing the legal scope of these requirements is Chapter VII of

[54] Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 *European Journal of International Law* 163-164.

[55] See also Trahan, 'ICC and the Security Council', 449; Solomon Dersso, 'The AU's Extraordinary Summit decisions on Africa-ICC Relationship', *EJIL Talk*, 28 October 2013 (arguing that the Council 'can exercise its authority under Article 16 only after determining that continuing with the prosecution constitutes a threat to international peace and security within the framework of Chapter VII of the UN Charter'); Charles Jalloh, 'Reflections on the Indictment of Sitting Heads of State and Government and Its Consequences for Peace and Stability and Reconciliation in Africa' (2014) 7 *African Journal of Legal Studies*, 54 (noting that the decision to reject the AU's deferral request was arguably 'the correct one, especially given that deferrals can only legally be authorized where there is an explicit trigger of a threat to the maintenance of international peace and security under Chapter VII').

[56] Statement of Luxembourg in UNSC, S/PV.7060, 15 November 2013.

[57] *Ibid.*, statement of the UK. See also the statements of Argentina (speaking of a 'strict interpretation' of Article 16) and Australia ('Security Council action under Article 16 … should be taken only in exceptional circumstances when the proceedings themselves threaten international peace and security and alternative options have been exhausted').

[58] Note that the Council also has a deferral power under the Charter. See Knottnerus, 'The Security Council and the ICC', 203-208 (arguing that while one may challenge the appropriateness of a deferral outside the context of Article 16, the legality of such a measure under the UN Charter seems beyond questioning). For a different take on this matter, see Oette, 'Peace and

the Charter as a whole, because Article 16 speaks of a 'Resolution adopted under Chapter VII' and does not explicitly refer to Article 39. It must be noted that under Chapter VII, a deferral can either be adopted as a provisional measure under Article 40 of the Charter,[59] or as a measure not involving the use of armed force under Article 41.[60] The legal nature of a deferral may perhaps best be reconciled with the notion of a provisional measure under Article 40, because a deferral will like most provisional measures be intended to create a 'stand still' and a 'cooling off effect'.[61] Yet, the broad formulation of Article 16 may also allow the Council to adopt a deferral as an enforcement measure under Article 41.

Regardless of whether a deferral is adopted under Article 40 or Article 41 of the Charter, a deferral is subject to the requirement of a prior determination of a threat to the peace, breach of the peace or an act of aggression in the meaning of Article 39.[62] In considering whether a certain situation amounts

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Justice, or Neither?', 351-354; Neha Jain, 'A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court' (2005) 16 *European Journal of International* Law 251.

[59] Article 40 of the Charter states that 'in order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures'.

[60] Article 41 of the Charter stipulates that 'The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'.

[61] ICTY Tadić Decision, para. 33. In considering whether the establishment of an international criminal tribunal by the Security Council would qualify as a provisional measure, the Tribunal stated that provisional measures 'as their denomination indicates, are intended to act as a "holding operation", producing a "stand-still" or a "cooling-off" effect, "without prejudice to the rights, claims or position of the parties concerned." … They are akin to emergency police action rather than to the activity of a judicial organ dispensing justice according to law'. The interpretation of Article 16 as a provisional measure in the meaning of Article 16 is also supported by the specific time limit in this provision.

[62] See Nico Krisch, 'Article 40', in Bruno Simma, Daniel-Erasmus Khan, George Nolte and Andreas Paulus (eds.), *The Charter of the United Nations - A Commentary* (Oxford: Oxford University Press, 2016, Third Edition), pp. 1298-1300. Krisch observed that 'the relationship between Arts. 39 and 40 is not entirely clear', but concluded that 'the systematic position of Art. 40 in

to a threat to the peace, the Council enjoys considerable discretion,[63] and is more or less free to decide on the measures it deems appropriate to address this threat.[64] Still, the powers of the Council are not unbound by law (*legibus solutus*).[65] In accordance with the principle of attribution of powers, the Council possesses only those powers that have been conferred or implied by the UN Charter.[66] It is on

Chapter VII … supports the view that provisional measures can only be adopted if the requirements of Art. 39 are met, thus if there exists at least a threat to the peace'. This interpretation would also be supported by most of the Council's practice on Article 40.

[63] See Nico Krisch, 'Article 39', in Bruno Simma, Daniel-Erasmus Khan, George Nolte and Andreas Paulus (eds.), *The Charter of the United Nations - A Commentary* (Oxford: Oxford University Press, 2016, Third Edition), pp. 1275-1276. Note that 'both the history of the Charter and subsequent state practice show that the Security Council is under no obligation to make a determination under Article 39, even if it considers that a threat to or breach of the peace exists'.

[64] Nico Krisch, 'Article 41', in Bruno Simma, Daniel-Erasmus Khan, George Nolte and Andreas Paulus (eds.), *The Charter of the United Nations - A Commentary* (Oxford: Oxford University Press, 2016, Third Edition), pp. 1305-1329.

[65] ICTY Tadić Decision, para. 28, 29, 31, 32 and 39, recalling the wide discretion under both Article 39 and 41 in relation to the appropriateness and the effectiveness of measures chosen. See also *Prosecutor v. Salim Jamil Ayyash et.al* (*STL-11-01IPT/AC/AR90.1),* Decision on the Defence Appeals Against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal', 24 October 2012, paras. 37, 51-51.

[66] *Conditions of Admission of a State to Membership in the United Nations (Art. 4 of the Charter)*, Advisory Opinion, [1948] ICJ Rep 57, p. 64. Note that the Council is under certain conditions, also bound by the applicable rules of customary international law, general principles of law and rules of *jus cogens. See generally* Anne Peters, 'Article 25', in Bruno Simma, Daniel-Erasmus Khan, George Nolte and Andreas Paulus (eds.), *The Charter of the United Nations - A Commentary* (Oxford: Oxford University Press, 2016, Third Edition), pp. 807-855. As I have discussed in more detail elsewhere, none of these rules pose meaningful limits on the kind of circumstances under which the Council may use its deferral power, because they do not prohibit or restrict a temporary ban on a particular investigation or prosecution. One possible limitation that might come to mind is the obligation to prosecute international crimes, which might have obtained the status of customary international law. However, if there is a customary duty or even a *jus cogens* norm obligating states to prosecute certain international crimes, then a deferral within or outside Article 16 is not prohibited by such an obligation. When the Council suspends (future) proceedings before the ICC it does not affect the domestic jurisdiction of states, which might still be able (and are perhaps even obliged) to prosecute the crimes concerned. Moreover, a deferral is not a permanent measure but only a temporary bar to the Court's investigations and prosecutions. See Knottnerus, 'The Security Council and the ICC, 203-208.

the basis of these internal limits to the Council's powers under Chapter VII that specific questions about the legal scope of the Council's deferral power in relation to Article 39 should be answered.

Firstly, does the Charter require the Council to make an explicit determination of a threat to the peace? Article 39 singles out the determination of a threat to the peace (or a breach of the peace or an act of aggression) as a procedural condition for the use of the Council's powers under Chapter VII.[67] Although the text of Article 39 does not define the 'conditions for action' in great clarity, its formulation and especially the word 'shall' insists that the Council should reach agreement on a determination before adopting any measures under Chapter VII, and that this determination should be reflected in the Resolution.[68] While using different formulations, the Council has generally observed this requirement in its practice.[69] Most Chapter VII Resolutions include a clause in which the Council finds that a certain situation poses a threat to the peace or in which the Council makes a reference to a previous Resolution that included such a determination.[70]

Given that Article 39 does not mention provisional measures under Article 40, it is not entirely clear whether the Council should also expressly determine the existence of a threat to the peace when adopting a deferral as a provisional measure rather than as an enforcement measure under Article 41. It might perhaps be argued that a provisional measure does not require an explicit determination but 'only an implicit finding' by the Council.[71] If this interpretation is accepted then the Council would not have

[67] Article 39 of the Charter states that 'the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'.

[68] Krisch, 'Article 39', pp. 1294-1295. Note that the Council is obliged to determine the existence of a threat to the peace, but that it does not need to 'expressly refer' to Article 39 or to Chapter VII in general.

[69] *Ibid.*

[70] *Ibid.* Only in a very small number of cases did the Council not make such a determination.

[71] For further discussion see Krisch, 'Article 40', p. 1299. See also Peter Kooijmans, 'Provisional Measures of the UN Security Council', in Erik Denters and Nico Schrijvers (eds.), *Reflections on International Law from the Low Countries: in Honour of Paul de Waart* (The Hague: Martinus Nijhoff, 1988), pp. 289-300.

to make an explicit determination on what constitutes a threat to the peace when issuing a deferral as a provisional measure under Article 40.

Secondly, can the Council act under Chapter VII in response to a general phenomenon or an entirely abstract or hypothetical threat? In a general sense, the concept of a threat 'implies preventive action well beyond imminent attacks'.[72] Yet, the extent to which this includes measures of conflict prevention and action of generalized threats is a matter of dispute. For what it is worth, the Council's practice has been far from uniform in this respect. The notion of a threat to the peace has undergone considerable change and has been expanded over the past three decades, especially with respect to arms control measures, internal situations and humanitarian considerations.[73] In light of these developments, the notion of a threat to the peace has not become limitless. That being said, depending on the 'unique' and 'exceptional' character of a certain situation the Council may very well permitted to issue a deferral in response to a general phenomenon, such as the opposition of a single state or a group of states against a particular investigation or prosecution.[74]

Thirdly, does the reference in Article 16 to Chapter VII somehow limit the Council's deferral power to the extent that the Council can only issue a deferral when the continuation of an investigation or prosecution poses by itself a threat to the peace in the sense of Article 39? In my view, the legal basis for such a limitation cannot be Chapter VII itself, because under the Charter there is no reason to limit the use of certain measures under Article 40 or Article 41 to a specific threat to the peace. If the Council were to determine that a certain situation constitutes a threat to the peace, then the Council is more or less free to choose the appropriate measures, including the possibility of a deferral of an investigation or prosecution that is related to this situation. The argument that a certain measure is only called for in particular situations, cannot be reconciled with the Council's broad discretion under Chapter VII to

[72] Krisch, 'Article 39', p. 1279.

[73] *Ibid.,* p. 1291.

[74] *Ibid.*

determine the existence of a threat to the peace and to decide upon the appropriate measures to address this threat.

The only possible legal basis for such a limitation to the Council's deferral power is Article 16 itself. However, the text of Article 16 does not support the requirement of a direct link between the continuation of an investigation or prosecution and the existence of a threat to the peace either. Article 16 requires a Resolution under Chapter VII, and neither the text nor the drafting history of this provision give any indication that the Council's discretion to adopt such a Resolution is somehow limited to a specific threat to the peace. From a policy-oriented perspective, it may be appropriate to limit the substantive scope of the Council's deferral power to situations in which the continuation of an investigation or prosecution poses by itself a threat to the peace. Yet, legally speaking, this alleged limitation to the Council's deferral power is unconvincing, because neither Article 16 nor Chapter VII specify how a threat to the peace should relate to a possible deferral of an investigation or prosecution.

In short, there is, from a legal point of view, no reason why the Council cannot adopt a deferral under Article 16 in reference to 'a larger factual or political background'. A deferral can be issued in response to a peace process, a terrorist attack or even the ICC's fragile relationship with certain states.[75] It can be disputed whether the Council has to make an explicit determination under Article 39. Yet, there clearly does not have to be a direct link between the Court's investigation or prosecution and the (implicit) determination of a threat to the peace under the UN Charter that leads the Council to issue a deferral for these proceedings. Calls for a 'strict interpretation' of Article 16 that follow Cassese's argumentation in this respect are unconvincing.[76] They seek to limit the scope of the Council's deferral power beyond the conditions that can be derived from the reference to Chapter VII in Article 16. The main question for the Council is whether a deferral can help to prevent an aggravation of the situation (if adopted under Article 40) and/or contribute to the maintenance or restoration of international peace

[75] Condorelli and Villalpando, 'Referral and Deferral by the Security Council', p. 647. See also Chris Gallavin, 'The Security Council and the ICC: Delineating the Scope of the Security Council Referrals and Deferrals' (2005) 5 New Zealand Armed Forces Law Review 32-33.

[76] Statement of Argentina in UNSC, S/PV.7060, 15 November 2013.

and security (if adopted under Article 41). This is first and foremost a question of political beliefs and reasonable expectations, rather than legal interpretation.

II. The Deferral Practice of the Security Council

In the course of its campaign against the prosecution and trial of sitting Heads of State, the AU has repeatedly asked the Security Council to make use of its discretionary power under Article 16. Two of these deferral requests stand out. First of all, in July 2008, the AU Peace and Security Council urged the members of the UN Security Council to suspend the prosecution of Omar al-Bashir before the PTC would take a decision on the Prosecutor's application for an arrest warrant. Secondly, in October 2013, an extraordinary meeting of the AU Assembly called upon the Council to defer the trials of Uhuru Kenyatta and William Ruto, and to keep renewing this deferral until the end of their presidential terms. How did the different members of the Council respond to these requests and to what extent are their respective positions based on a convincing interpretation of Article 16?

A. The deferral request for al-Bashir (2008-2017)

The first time that the AU asked for a deferral was just a few days after the Prosecutor requested the Pre-Trial Chamber to issue an arrest warrant for al-Bashir in July 2008.[77] In response to the Prosecutor's application, the AU Peace and Security Council issued a communiqué stating that the proceedings against the President of Sudan had to be suspended, because an actual warrant could 'seriously

[77] AUPSC, Communiqué July 2008, para. 9. Note that the AUPSC also responded to the Prosecutor's application by inviting the AU Commission to establish 'an independent High-Level Panel … to examine the situation in depth and submit recommendations to the Council on how best the issues of accountability and combating impunity, on the one hand, and reconciliation and healing, on the other, could be effectively and comprehensively addressed, including through the establishment of truth and/or reconciliation Commissions' (para. 11, ii). This Panel, led by former South African President Thabo Mbeki, published its recommendations in October 2009. It did not take a position on the deferral request but did note the arguments of both the supporters and opponents of a deferral. AU, Report High-Level Panel on Darfur (October 2009), paras. 242-243.

undermine the ongoing efforts aimed at facilitating the early Resolution of the conflict in Darfur and the promotion of long-lasting peace and reconciliation in the Sudan as a whole'.[78]

The AU's proposal to defer al-Bashir's prosecution was introduced to the Council a few weeks later. In the margin of a previously scheduled meeting on the joint peacekeeping mission of the UN and the AU in Darfur (UNAMID),[79] South Africa and Libya pushed the deferral request on the Council's agenda by making its consideration a condition for their continued support to the mission.[80] In this respect, they followed the earlier example of the US, which had pressured the Council to adopt Resolutions 1422 and 1487 by threatening to veto all UN peacekeeping operations unless the Council would protect its military personnel from prosecution by the Court.[81]

In the build-up to the Council's meeting, the three African states in the Council (Burkina Faso, Libya and South Africa) received support from the League of Arab States,[82] the Organization of the

[78] At the time, nine of the fifteen members of the AUPSC were a party to the Rome Statute: Burundi, Chad, Uganda, Zambia, Benin, Burkina Faso, Mali, Gabon and Nigeria. The other members of the AUPSC were Tunisia, Swaziland, Rwanda, Ethiopia, Algeria and Angola. See AU Executive Council, Decision on Election of Five (5) Members of the Peace and Security Council of the African Union, Doc. EX.CL/326 (X), 29-30 January 2007; AU Executive Council, Decision on the Election of Ten (10) Members of the Peace and Security Council of the African Union, Doc. EX.CL/402 (XII), 25-29 January 2008.

[79] This hybrid operation was established in UNSC, Resolution 1769, 31 July 2007.

[80] Security Council Report, 'Update Report No. 4: Sudan', 28 July 2008. Note that the AUPSC had already decided to extend the mandate of UNAMID and had requested the Security Council to do the same. AUPSC, Communiqué July 2008, para. 12.

[81] After the Council's meeting several members emphasized that something as controversial as a deferral should be addressed on a 'different occasion' and that peacekeeping missions should not be held hostage to a deferral request. See the statements of Belgium, Costa Rica and the UK in UNSC, S/PV.5947, 31 July 2008.

[82] See the letter from the Permanent Observer of the League of Arab States to the UN addressed to the President of the Security Council: UNSC, S/2008/505, 30 July 2008 (stating that the League was 'perturbed by the grave impact on the current peace process in the Sudan'). See also 'Arab League criticizes ICC charges against Sudan', *Reuters*, 16 July 2008; UNSC, S/2008/656, 17 October 2008 (a copy of the Resolution adopted by the Special Session of the Council of Arab Ministers of Justice, held in Cairo on 12 October 2008).

Islamic Conference,[83] and the Non-Aligned Movement.[84] Moreover, within the Council, several states expressed support for a deferral as well, including China and Russia. China argued that the prosecution of al-Bashir was an 'inappropriate decision taken at an inappropriate time' and stated that this decision could 'seriously undermine the atmosphere of mutual political trust and cooperation between the [UN] and the Sudanese Government, fuel the arrogance of the rebel groups … and harm the fragile and turbulent security situation in Darfur'.[85] Russia added that there was broad support for a deferral and warned that the 'resistance by a number of Security Council members' to the AU's request could have 'negative consequences' for the peace negotiations in Darfur.[86]

The resistance that Russia referred to came especially from the UK, France and the US, as well as from the non-permanent European members (Belgium, Croatia and Italy) and the Latin American members of the Council (Costa Rica and Panama). Some of these states denounced the possibility of a deferral completely. Croatia stated, for example, that there should not be 'any impediment … to the free and independent work' of the Court, and Belgium 'refute[d] the arguments of those who are calling upon the Council to react in advance to developments that we cannot foresee at this stage'.[87] The strongest statement against a deferral came, however, from the US which argued that even the suggestion of a deferral sent 'the wrong signal' to al-Bashir and 'undermined efforts to bring him and others to justice'.[88]

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[83] See the letter from the Permanent Representative of Uganda to the UN addressed to the President of the Security Council: UNSC, S/2008/483, 23 July 2008 ('to indict President Bashir will adversely affect the ongoing peace initiatives … and complicate the stabilization efforts in Darfur and also the implementation of the Comprehensive Peace Agreement in Southern Sudan'). See also the letter from the Permanent Representative of Senegal to the UN addressed to the President of the Security Council, which includes the final communiqué of the expanded ministerial meeting of the Executive Committee of the Organization of the Islamic Conference on the latest developments in the Sudan (dated 4 August 2008): UNSC, S/2008/525, 6 August 2008.

[84] On the position of the Non-Aligned Movement, see the letter from the Permanent Representative of Cuba to the UN: UNSC, S/2009/99, 19 February 2009.

[85] Statement of China in UNSC, S/PV.5947, 31 July 2008.

[86] *Ibid.* statement of Russia. See also the statements of Indonesia and Vietnam during the same meeting.

[87] *Ibid.* statements of Croatia and Belgium.

[88] *Ibid.* statement of the US.

A few weeks later, US Ambassador Richard Williamson stated that 'if forced to vote today—the United States, even if it was 191 countries against one, would veto an Article 16 [Resolution]'.[89]

Despite the strong disagreement on the AU's proposal, the members of the Council managed to craft a deal on the extension of UNAMID and the full deployment of 10,000 troops to Darfur. With the exception of the US, which abstained from voting, the Council agreed to recall the communiqué of the AUPSC and to take note of the intention of 'some' members to further consider 'concerns raised … regarding potential developments' caused by the Prosecutor's application for an arrest warrant against al-Bashir.[90] As explained by the representative of the UK, which prepared the Resolution and functioned as its informal coordinator, this language was included to reflect the idea that the AU's deferral request could 'be addressed on another day', but that for the time being the Council had not taken a position 'on the question of whether to take any action in the light of the [Prosecutor's application]'.[91]

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[89] See Daniel van Oudenaren, 'US Will Veto Attempts to Defer ICC Move against Sudan President', *Sudan Tribune*, 24 September 2008. Note that in response to the AU's deferral request for al-Bashir, David Scheffer, the Head of the US delegation to the Rome Conference, argued that such a deferral is invalid under the Statute because the drafters envisioned Article 16 as a 'brake on premature State party or Prosecutor referrals' and not as a check on Security Council referrals. There is, however, no support in the Statute for excluding the possibility that the Council exercises its deferral power in relation to a referral by the Security Council itself. Furthermore, during the Council's debate, not a single state (not even the US) questioned whether the Council has the power under the Statute to issue a deferral in relation to referral-based cases. David Scheffer, 'The Security Council's Struggle over Darfur and International Justice', *Jurist*, 20 August 2008. For a similar argument as Scheffer, see Lawrence Moss, 'The UN Security Council and the International Criminal Court - Towards a More Principled Relationship', *Friedrich-Ebert-Stiftung*, March 2012, p. 7. For a more detailed reply to Scheffer's argument see Oette, 'Peace and Justice, or Neither?', 350-351; Cryer, 'The Security Council, Article 16 and Darfur'; Knottnerus, 'The Security Council and the ICC', 209-210.

[90] This reference was included in the preamble of UNSC, Resolution 1828, 31 July 2008. Note that the US abstained on the Resolution, because of the reference to the possibility of a deferral. Statement of the US in UNSC, S/PV.5947, 31 July 2008.

[91] *Ibid.*, statement of the UK. Note that the UK, as President of the Council, clarified in its comments to the media that no formal deferral request had been introduced. Informal comments to the Media by the Permanent Representative of the United Kingdom, H.E. Sir John Sawers, on the situation in Sudan, *UN Webcast*, 31 July 2008.

Following the Council's meeting, the debate on the AU's deferral request continued during informal consultations.[92] Unfortunately, there are no publically available reports of these meetings. Yet, unofficial sources note that low level discussions took place 'on what, hypothetically, could be contained in an Article 16 deferral Resolution for Bashir'.[93] Furthermore, the representatives of the UK and France hinted on several public occasions in the second half of 2008 that they would be willing to consider a deferral in exchange for Sudan's full cooperation with UNAMID and with the ICC on the outstanding warrants for Ahmed Harun (then Sudan's minister of state for humanitarian affairs, now Governor of North Kordofan), and for Ali Kushayb (a senior commander of the Janjaweed militia).[94] It is not clear whether such a proposal was ever offered to the Sudanese Government.

[92] Note, for example, that on 12 February 2009, the Council held an informal interactive discussion with a joint delegation from the AU and the League of Arab States, in order to have a preliminary exchange of views on the possible decision by the ICC against al-Bashir. See the Assessment of the work of the Security Council during the presidency of Japan (February 2009): UNSC, S/2009/138, 10 March 2009.

[93] For an informal summary of these discussions, see Dire Tladi, 'When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic' (2014) 7 *African Journal of Legal Studies* 396. According to Tladi (who was involved as legal counsellor at the Permanent Mission of South Africa to the UN), these discussions focussed on (1) the kind of conditions that have to be included to ensure that a deferral would not be a 'blank cheque'; (2) on whether these conditions would have to be met before the deferral would enter into force; (3) and on whether the deferral would be renewed indefinitely or whether, at some point, it would be lifted notwithstanding Sudan's cooperation. See also 'Sudan/ICC: UK Strategy with Potential Bashir ICC Indictment', *Daily Telegraph,* 15 July 2011. One of the cited cables that were made public by WikiLeaks suggested that the UK Government considered that Article 16 was a 'card not to sell cheaply', but that it was an option that had to remain on the table. One cable also stated that 'although [her Majesty's Government] will not acknowledge it publicly, the UK is doing everything it can to remain flexible on the ICC and to use Bashir's potential indictment as a lever to change the dynamic on the Darfur political process'.

[94] Statement of the UK in UNSC, S/PV.5947, 31 July 2008. See also the statement of France in UNGA, 'Press Conference following the statement of H.E. Mr. Nicolas Sarkozy, President of France', 23 September 2008 ('If the Sudanese authorities do change, totally change their policy, then France would not be opposed to using Article 16'). For further discussion, see David Bosco, *Rough Justice - The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014), pp. 144-148.

In any case, the informal consultations in the Council did not bring about any meaningful shifts in the debate on the AU's deferral bid.[95] Especially after the brief window between the Prosecutor's announcement (July 2008) and the PTC's decision on an arrest warrant for al-Bashir (March 2009) had passed, the Council proved unable to agree on any official response to the AU's request.[96] The Council did not convene a formal debate, and did not decide on a presidential statement, let alone on a Resolution that endorsed or denounced the proposed deferral. Instead, it was reported in March 2011 that the Council's rotating membership had 'little appetite' to continue debating this contentious issue.[97] The available sources suggest that the deferral request has not been on the Council's official agenda ever since, even though the AU Assembly has continued to call upon the Council to consider this proposal.[98]

The limited response of the Council to the deferral request for al-Bashir has disappointed the AU strongly.[99] In July 2009, one year after the Prosecutor's application for an arrest warrant against al-

[95] This is confirmed by the official statements that were made in response to the Prosecutor's updates to the Council on his investigation in Darfur (in December 2008 and December 2009). See UNSC, S/PV.6028, 3 December 2008; UNSC, S/PV.6230, 4 December 2009. Note that in 2010 and 2011 the Prosecutor's updates were followed by a closed consultation instead of a public debate among the members of the Council. Likewise, the Council's first session on Sudan after the prosecution of al-Bashir took place behind closed doors. See UNSC, S/PV.6136, 5 June 2009; UNSC, S/PV.6337, 11 June 2010; UNSC, S/PV.6441, 9 December 2010; UNSC, S/PV.6549, 8 June 2011; UNSC, S/PV.6689, 15 December 2011.

[96] Note that the AUPSC responded to the PTC's decision by arguing that it came 'at a critical juncture in the process to promote lasting peace, reconciliation and democratic governance in the Sudan' and by expressing its deep regret that the Council had 'failed to consider' the deferral request 'with the required attention'. AUPSC, Communiqué, PSC/PR/Comm. (CLXXV), 5 March 2009, paras. 2 and 5.

[97] Security Council Report, 'Sudan - March 2011 Monthly Forecast', 28 February 2011.

[98] Most recently, the AU recalled this request in AU Assembly, Decision on the International Criminal Court, Assembly/AU/Dec.622(XXVIII), 30-31 January 2017, para. 2(ii).

[99] Note that the Council's 'failure to meaningfully engage' with the AU's deferral request may also have been the result of various other factors, including that the African states did not use 'all the means at their disposal to ensure that the Council actively considered the matter'. See Charles Jalloh, Dapo Akande and Max du Plessis, 'Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court' (2011) 4 *African Journal of Legal Studies* 21-22 (noting that various African states holding a seat in the Council were not prepared to take the lead in authoring and sponsoring a deferral request).

Bashir, the AU Assembly decided that because its deferral request had 'neither been heard nor acted upon', its member states would not cooperate with the Court on his arrest and surrender.[100] According to the AU Commission, this decision bore 'testimony to the glaring reality that the situation in Darfur is too serious and complex to be resolved without recourse to a harmonized approach to justice and peace'.[101] The AU Assembly invoked the Council's refusal to issue a deferral as a political justification for its decision to suspend the cooperation with the Court on the prosecution of al-Bashir.[102] Moreover, African states have repeatedly stated in the UN General Assembly, the Security Council and the ASP that one of the main reasons for the ongoing tensions between the AU and the ICC is that the Council did not consider the deferral request for al-Bashir in a serious manner.[103]

[100] AU Assembly, Decision on the Meeting of African states parties to the Rome Statute of the International Criminal Court, Assembly/AU/Dec.245(XIII), 1-3 July 2009, para. 9. Note that as a legal justification for its decision, the AU referred to Article 98(1) of the Statute. This is further discussed in chapter 3. See also UNSC, S/2009/117, 25 February 2009 (Identical letters from the representatives of Cuba, Oman, Senegal and Uganda to the UN on deferral request al-Bashir); UNSC, S/2009/148, 18 March 2009 (Letter from the Permanent Observer of the League of Arab States to the UN expressing 'its profound regret at the inability of the Security Council to invoke Article 16 ... in order to defer the actions that have been taken by the Court').

[101] AU Commission, Press Release - Decision on the Meeting of African states parties to the Rome Statute of the ICC, 14 July 2009. The Commission further stressed that the Assembly's decision 'should be received as a significant pronouncement by the supreme AU decision-making body and a balanced expression of willingness to promote both peace and justice in Darfur'.

[102] Note that the report of the AU High-level Panel on Darfur appeared a few months later (October 2009). This report did not take a position on the matter of the proposed deferral, or the Court's involvement more generally, but in its communiqué on the report, the AUPSC did urge the Council 'once again … to heed the AU's call for the deferral of the process initiated [against al-Bashir] in the interest of peace, justice and reconciliation'. AUPSC, Communiqué, PSC/AHG/COMM.1(CCVII), 29 October 2009.

[103] See the statements of Ethiopia (on behalf of the AU) in ASP, General Debate of the Fourteen Session, 18-19 November 2015; Lesotho (on behalf of the African states parties, stating that 'concern has mounted that the Security Council has disrespected the AU by failing to respond either positively or negatively to its deferral request'), Namibia and Tanzania in ASP, General Debate of the Thirteenth Session, 8-17 December 2014; Namibia in ASP, General Debate of the Tenth Session, 14-15 December 2011; the DRC (on behalf of the African states parties) in ASP, General Debate of the Ninth Session, 6, 7 and 9 December 2010; the AU (by Ben Kioko, Legal Counsel of the AU Commission on behalf of the AU Commission) in ASP, General Debate ICC Review Conference, 31 May and 1 June 2010; Angola and Chad in UNSC, S/PV.7582, 15 December

B. The deferral requests for Kenyatta and Ruto (2011-2013)

In January 2011, the AU submitted a second deferral request to the Security Council asking the Council to suspend the Court's investigation and prosecution in relation to the 2007-2008 Post-Election Violence in Kenya (PEV).[104] This request followed upon the decision of the Prosecutor to indict six Kenyans for crimes against humanity, including Uhuru Kenyatta and William Ruto, who were by that time still members of rival political parties.[105] According to the AU and the Kenyan Government, then led by President Mwai Kibaki and Prime Minister Raila Odinga, the Security Council had to invoke Article 16 in order 'to prevent the resumption of conflict and violence' in Kenya, and to allow a 'National Mechanism' to investigate the PEV.[106]

The Council briefly discussed this proposal in an informal dialogue and in two consultations with representatives of the Kenyan Government.[107] However, the Council proved unable to reach

2015; Angola in UNSC, S/PV.7478, 29 June 2015; Rwanda in UNSC, S/PV.7337, 12 December 2014; Rwanda and Egypt in UNSC, S/PV.7285, 23 October 2014; Rwanda in UNSC, S/PV.7199, 17 June 2014; Morocco and Rwanda in UNSC, S/PV.7080, 11 December 2013; Tanzania in UNSC, S/PV.6849, 17 October 2012; Burkina Faso and Libya in UNSC, S/PV.6230, 4 December 2009; Algeria in UNGA, A/69/PV.35, 31 October 2014; Eritrea and Namibia in UNGA, A/68/PV.42, 31 October 2013; Egypt in UNGA, A/66/PV.44, 26 October 2011; Zambia (on behalf of the African states parties, stating that 'Resolution of this issue is the only way to facilitate cooperation between the African Union and the ICC') in UNGA, A/65/PV.39, 28 October 2010; and South Africa, UNGA, A/64/PV.29, 29 October 2009. Note that several commentators have expressed similar concerns about the Council's response to the AU's deferral request for al-Bashir. See, for example, Jalloh, 'Reflections on the Indictment of Sitting Heads of State', 54 (arguing that 'from a distant observer perspective, it would appear that the Sudan Situation deferral requests… should have received greater attention in the Council'); Tladi, 'When Elephants Collide it is the Grass that Suffers', 396-397; Jalloh, Akande and Du Plessis, 'AU Concerns about Article 16', 8.

[104] AU Assembly, Decision on the Implementation of the Decisions on the International Criminal Court, Assembly/AU/Dec.334(XVI), 30-31 January 2011, para. 6.

[105] On the domestic political dynamics behind Kenya's initial deferral request, see Sara Kendall, ''UhuRuto' and Other Leviathans: the International Criminal Court and the Kenyan Political Order' (2014) 7 *African Journal of Legal Studies* 408-409, 414.

[106] AU Assembly, Decision January 2011, para. 6.

[107] On 23 March 2011, Kenya sent a letter (S/2011/201) to the President of the Council, requesting an open debate on its deferral request. Before sending this letter, the possibility of a deferral was discussed during an informal interactive dialogue with

consensus on the matter.[108] The main problem was that most members of the Council, even those sympathetic to Kenya and the AU, felt that the proposal did not fall within 'the parameters of Article 16'.[109] In their opinion, the concerns of Kenya and the AU were not about a perceived conflict between the requirements of peace and prosecution, but concerned the scope of the complementarity principle. The key argument that Kenya and the AU advanced in support of a deferral was that Kenya should be allowed to conduct its own investigation. According to the majority of the Council, however, the feasibility of this argument should be assessed by the Court in the context of an admissibility application under Article 19 of the Statute and not by the Council under Article 16.[110]

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representatives of Kenya and the AU on 18 March 2011 (which followed upon an earlier letter of Kenya dated 4 March 2011, S/2011/116). In response to the second letter, the Council met in consultations on 8 April 2011, see Security Council Report, 'May 2011 Monthly Forecast - Status Update', 29 April 2011.

[108] After the informal consultations, the President of the Council, Mr. Néstor Osorio from Colombia, stated that 'after full consideration, the members of the Security Council did not agree on the matter'. See UNSC, Informal comments to the media, 8 April 2011.

[109] Tladi, 'When Elephants Collide it is the Grass that Suffers', 397. He noted that 'of the fifteen members of the Security Council only one member supported the request of Kenya for an Article 16 deferral'.

[110] Note that the Government's admissibility challenge was dismissed by the PTC in May 2011 because the evidence did not demonstrate that the Kenyan Government had taken any concrete steps to investigate the respective suspects. This decision was confirmed by the Appeals Chamber in August 2011 (with Judge Usacka dissenting). *Ruto, Kosgey and Sang* (ICC-01/09-01/11-101), Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 May 2011; *Ruto, Kosgey and Sang* (ICC-01/09-02/11-274), Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 31 August 2011. For further discussion, see generally Carsten Stahn, 'Admissibility Challenges before the ICC - From Quasi-Primacy to Qualified Deference?', in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), pp. 228-259. Note that despite the Council's rejection, the AU reiterated the proposed deferral in July 2011 (stressing 'the need to pursue all efforts in ensuring that the request by the AU to the UN Security Council to defer the investigations and prosecutions in relation to the 2008 post-election violence in Kenya under Article 16 of the Rome Statute be acted upon') as well as in January and July 2012. AU Assembly, Decision July 2011, para. 4; AU Assembly, Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/Dec.397(XVIII), 29-30 January 2012, para. 4; AU Assembly, Decision on the implementation of the Decisions

Another deferral request was introduced by Kenya and the AU following the election of Kenyatta and Ruto as President and Deputy President of Kenya in March 2013.[111] Upon their surprising victory, the new Kenyan Government immediately took several steps aimed at interrupting the trials of Kenyatta and Ruto, which were scheduled to begin shortly.[112] Firstly, Kenya sent a *note verbale* to the Security Council requesting a termination of the trials based on Article 41 of the Charter. When several states questioned whether a termination of the cases by the Council would legally even be possible under the UN Charter and/or the Rome Statute, Kenya quickly transformed its termination request into a deferral request under Article 16.[113] Secondly, the Kenyan Government and its regional allies in East Africa, especially Uganda, convinced the AU to intensify its campaign against the ICC. This led the AU Assembly to express its concerns in May 2013 over the prosecution of Kenyatta and Ruto, because their trials could jeopardize 'the on-going efforts in the promotion of peace, national healing and reconciliation, as well as the rule of law and stability, not only in Kenya, but also in the Region'.[114] More concretely, the assembled African Heads of State endorsed the request of Kenya 'for a referral of the ICC investigations and prosecutions in relation to the Post-Election Violence in Kenya, in line with the principle of complementarity, to allow for a National Mechanism to investigate and prosecute the cases under a reformed Judiciary'.[115]

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on the International Criminal Court, Assembly/AU/Dec.419(XIX), 15-16 July 2012, para. 4. There was no formal response of the Council to these requests.

[111] On the role of the ICC in bringing Kenyatta and Ruto together, see Kendall, 'UhuRuto and Other Leviathans', 406-412.

[112] Note that Kenya and the AU also pressured the Court's judges to excuse Kenyatta and Ruto from continuous presence at trial. This is discussed in chapter 4.

[113] On 2 May 2013, Kenya sent a note verbale to the Council requesting a termination of their trials based on Article 41 of the Charter. On 13 May 2013, Kenya sent another letter to the Council requesting an informal interactive dialogue, which took place on 23 May 2013. During this meeting, Kenya proposed a deferral under Article 16.

[114] AU Assembly, Decision on International Jurisdiction, Justice and the International Criminal Court, Assembly/AU/Dec.482(XXI), 27-28 May 2013, para. 5.

[115] *Ibid.* para. 7.

In first instance, the output of these different diplomatic initiatives was very limited. The Council discussed the termination/deferral request during an informal dialogue on 23 May, but did not take a decision on the matter.[116] Meanwhile, the proposal to refer the cases to a new national judicial mechanism was dismissed by the Court's judges. It was brought to the attention of the Presidency of the Court through two subsequent letters signed by the Ethiopian Prime Minister Hailemarian Desalegm (as Chairperson of the AU) and by Nokoazana Dlamini-Zuma (as Chairperson of the AU Commission).[117] Yet, the President of the Court, Judge Song, and later the Court's second Vice-President, Judge Tarfusser, refused to assess this proposal on its merits as it would not 'constitute a request to the Court in accordance with the Court's legal framework'.[118]

This course of events motivated the Kenyan Government and its regional allies to convene an extraordinary summit of the AU Assembly to discuss Africa's relationship with the ICC.[119] During this meeting, which took place on 11 and 12 October 2013, the assembled African leaders agreed that the trials of Kenyatta and Ruto 'should be suspended until they complete their terms of office' and that 'no

[116] Security Council Report, 'Informal Interactive Dialogue with Kenya on ICC Issue', 22 May 2013.

[117] AU, Letter to the ICC, BC/U/1657.09.13, 10 September 2013. These letters also included the request to allow Kenyatta and Ruto to choose the sessions they wished to attend. This is further discussed in chapter 4.

[118] See ICC Presidency, Letter from Judge Cuno Tarfusser to the AU, 2013/PRES/00295-4/VPT/MH, 13 September 2013. For a brief discussion of this letter, see Kendall, 'UhuRuto and Other Leviathans', 415. She characterized the Court's response as 'a telling instance of what Kamari Clarke has termed 'legal encapsulation''. See also ASP, Letter from ASP President Tiina Intelmann, ASP/NY/2013/027, 20 September 2013.

[119] Note that Kenya also asked the ASP to convene a special session in accordance with Article 112(6) of the Statute and Rule 8 of the Rules of Procedure of the ASP (stating that 'Special sessions of the Assembly may also be convened by the Bureau on its own initiative or at the request of one third of the States Parties in accordance with paragraph 6 of article 112 of the Statute). This special session would have to address, *inter alia*, 'the situation in which the State of Kenya finds itself … with its President and the [Deputy] President indicted by the [ICC]'. The proposal was introduced to the Bureau by Macharia Kamau on 17 June 2013. ASP, Bureau of the ASP - sixth meeting, 17 June 2013 and deliberated by the members of the Bureau during several (informal) meetings. The Bureau could not, however, reach consensus on this proposal, and it was eventually decided that the Bureau could 'consider this issue again', but only if new information was submitted or if new circumstances arose'. See ASP, Bureau of the ASP - seventh meeting, 8 July 2013; ASP, Bureau of the ASP - eighth meeting, 19 July 2013.

charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government'.[120] In order to give effect to this decision, the Assembly called for amendments to the Statute,[121] and established a Contact Group of five states with the task to get feedback from the Security Council on a possible deferral before the scheduled start of Kenyatta's trial on 12 November 2013.[122] The Assembly warned that Kenyatta would not attend his trial 'until such time as the concerns raised by the AU … [would] have been adequately addressed'.[123]

In the following weeks, this 'upgraded' deferral request for Kenyatta and Ruto gained momentum. The request was formally transmitted to the Council by Kenya's Ambassador to the UN, Macharia Kamau, and by the Chairperson of the AU Commission, Dlamini-Zuma.[124] In their respective letters, they portrayed Kenyatta and Ruto as the 'democratically elected' leaders of a 'frontline state' in the fight against terrorism in East Africa.[125] Their main argument for a deferral of their cases was that the Court's trials obstructed Kenyatta and Ruto in the exercise of their 'constitutional responsibilities', especially in the wake of the terrorist attacks that took place at Nairobi's Westgate Shopping Mall in the third week of September.[126]

In response to the two letters, the Security Council invited the foreign minister of Kenya, Amina Mohamed, and the AU's Contact Group (composed of the (deputy) foreign ministers of Burundi,

[120] AU Assembly, Decision October 2013, para. 10.

[121] The proposed amendments are discussed in part IV of this chapter (on Article 16) and in chapter 4 (on Articles 27 and 63). For a general overview of all the proposed amendments by the AU, see annex II.

[122] *Ibid.* Note that the African leaders also decided that the thirty-four African states parties to the Court would inscribe the issue of indicting sitting Heads of State and Government on the agenda of the ASP. This is further discussed in part V of this chapter as well as in chapter 4. Note that the decision also spoke about a deferral for President al-Bashir, but that the AU did not take any further action on this request.

[123] *Ibid.*, para. 10(xi)

[124] UNSC, S/2013/624, 12 October 2013 (letters from the AU and the Permanent Representative of Kenya to the UN on deferral request for Kenyatta and Ruto).

[125] *Ibid.*

[126] *Ibid.*

Ethiopia, Mauritania, Namibia and Uganda) for an interactive dialogue on 31 October. During this informal consultation, the Council proved divided, however, along the same lines as with the deferral request for al-Bashir.[127] Some states, including China and Russia, expressed their support for a deferral, but the Court's states parties and especially the US opposed such a measure in strong terms.

Following the informal consultations, the three African members of the Council (Morocco, Rwanda and Togo) decided to put the AU's deferral request to a vote on 15 November.[128] Diplomatically speaking this was a bold move. Yet, the AU wanted an official decision on its deferral request before the annual meeting of the ASP, which would start only a few days later. After last-minute attempts to bring the different views together, the Council voted on the proposal and rejected it with seven votes in favour and eight abstentions. Azerbaijan, China, Morocco, Pakistan, Russia, Rwanda and Togo (none of whom are party to the Rome Statute) supported the draft Resolution. Argentina, Australia, France, Guatemala, Luxembourg, the Republic of Korea and the UK (all states parties) as well as the US abstained from voting.

The statements that the members of the Council made after casting their votes show that the debate in the Council focussed on the applicability of Article 16 and on the necessity of a deferral. For the states that supported the AU's deferral request, the 'functionality of the offices of the elected President and [Deputy] President of Kenya' was the most important argument.[129] In their view, the trials had to be suspended because they could otherwise 'create serious obstacles to the normal functioning of State institutions in Kenya and thereby pose a threat to the ongoing efforts to ensure and promote peace

[127] Security Council Report, 'AU Request for ICC Deferral of Kenyan Situation', 13 November 2013. For an unofficial report on what happened during the interactive dialogue, see AU, Draft Report of Mission AU Contact Group on ICC, 12 November 2013.

[128] See draft Resolution, UNSC, S/2013/660, 15 November 2013 (formally introduced by Azerbaijan, Burundi, Ethiopia, Gabon, Ghana, Kenya, Mauritania, Mauritius, Morocco, Namibia, Rwanda, Senegal, Togo and Uganda).

[129] Statement of Pakistan in UNSC, S/PV.7060, 15 November 2013. See also the statements of Azerbaijan, China, Ethiopia, Kenya, Morocco, Russia, Rwanda and Togo.

and stability in the region'.[130] Opponents of the proposed deferral, challenged the applicability of Article 16.[131] While recognizing that Kenyatta and Ruto faced 'a serious challenge trying to meet their trial obligations at the same time as devoting their attention to tackling threats in their country and the region', they argued that Article 16 should only be invoked 'in exceptional circumstances when the proceedings themselves threaten international peace and security'.[132] Based on a 'strict interpretation of Article 16' these states maintained that 'the reference to Chapter VII [in Article 16] means that the [Council] must assume the existence of a threat to the peace *due to* the very fact of the proceedings under way in the ICC' (emphasis added).[133] According to their assessment, the security situation in Kenya and East Africa was 'volatile and precarious', but the continued prosecution of Kenyatta and Ruto did not constitute 'in itself a threat to international peace and security' in the sense of Article 39 of the Charter.[134]

Additionally, a number of states questioned the necessity of a deferral. They noted that the Trial Chamber had already been very flexible in the proceedings against Kenyatta and Ruto, especially by adjourning Ruto's trial after the Westgate Mall Attack,[135] and by postponing the opening of Kenyatta's trial until 5 February 2014.[136] All this would ensure that 'at any time either the President or the [Deputy] President [would] be fully available to manage the affairs of Kenya'.[137] Moreover, any remaining concerns about the proceedings against Kenyatta and Ruto could be addressed by the ASP. Several states suggested in reference to the upcoming meeting of the ASP that the Court's Rules could be amended so

[130] *Ibid.*, statement of Russia.

[131] *Ibid.*, statements of Argentina, Australia, Luxembourg and the UK.

[132] *Ibid.*, statement of Australia.

[133] *Ibid.*, statements of Argentina and Luxembourg.

[134] *Ibid.*, statements of Australia and the UK.

[135] *Ruto and Sang* (ICC-01/09/-01/11-T-37-Red-ENG), Trial Hearing - Proceedings, 23 September 2013, p. 8.

[136] *Kenyatta* (ICC-01/09-02/11-847), Decision adjourning the commencement of trial, 31 October 2013. Note that this decision was not really motivated by concerns of flexibility. The Chamber decided to adjourn the opening of the trial because the parties agreed that this would 'give the Prosecution additional time to investigate … factual allegations raised by the Defence' (para. 5).

[137] Statement of Luxembourg in UNSC, S/PV.7060, 15 November 2013. See also the statement of Australia.

that Kenyatta and Ruto would not have to 'choose between mounting a vigorous legal defence, on the one hand, and continuing their jobs on the other'.[138]

Finally, apart from questions about the applicability of Article 16 and the necessity of a deferral, several states opposed the proposed deferral for setting a 'dangerous precedent'.[139] In their view, a suspension of the trials of Kenyatta and Ruto would 'promote the law of the jungle' and encourage other sitting Heads of States (*i.e.,* al-Bashir) and warlords (*i.e.,* Joseph Kony) to demand a deferral for their prosecutions.[140] Argentina, Guatemala and South Korea warned, for example, that a deferral could have negative consequences in the long run and hinted in their statements that Article 16 should preferably never be invoked by the Council.[141]

For the AU as well as the Kenyan Government, the Council's vote was another serious disappointment. In their first reactions, several African states proclaimed that Article 16 was apparently 'never meant to be used by an African state',[142] and in an official statement the AU even went so far as to say that the Council's rejection made Article 16 'redundant' and that 'the irresistible conclusion' had to be that the ICC is 'no longer a Court for all, but only to deal with Africans in the most rigid way'.[143] These and other reactions reflected the high level of frustration among African leaders about the

[138] *Ibid.*, statement of the US. See also the statements of Argentina, France, Luxembourg and the UK.

[139] These are the words of Richard Dicker, Director of the International Justice Program of Human Rights Watch, as quoted in Margaret Besheer, 'AU Presses Kenyatta ICC Deferral Request', *Voice of America*, 31 October 2013. See also the statement of South Korea in UNSC, S/PV.7060, 15 November 2013 ('[i]t is desirable not to set a precedent of the Security Council's involvement in the ICC's legal process').

[140] *Ibid.* statement of Argentina.

[141] In a similar vein, several NGOs argued that a deferral for the Kenyan leaders would delay justice for the victims and would impose further hardship on witnesses. See, for example, 'A Memorandum from Kenyan Civil Society Organizations to UNSC against Deferral of Kenya cases before the ICC', 23 October 2013.

[142] Statement of Rwanda in UNSC, S/PV.7060, 15 November 2013. See also the statements of Ethiopia (as representative of the Chairperson of the AU), Kenya, Morocco and Togo.

[143] Statement of Uganda on behalf of the AU as well as the statements of Namibia, Nigeria, Seychelles, South Africa and Tanzania in ASP, General Debate 2013.

Council's decision-making on the AU's deferral requests for Kenyatta and Ruto and earlier for al-Bashir.[144] As expressed by the AU Assembly in its decision of early 2014, the predominant feeling among African states was that the Council should have reserved a more 'timely and appropriate response' to these requests in order to avoid 'the sense of lack of consideration of a whole continent'.[145]

C. Different positions on the interpretation and application of Article 16

The reconstruction of the responses to the AU's deferral requests for al-Bashir, Kenyatta and Ruto is necessarily based on a limited set of sources. Generally speaking it is difficult to obtain information about the Council's decision-making process, especially when proposals are not brought to a vote and when there are only a few official records available. A lack of sources forms a complicating factor with respect to the Council's negotiations on the AU's deferral requests as well. The proposed deferral for al-Bashir was never voted upon and there are hardly any reports on the informal meetings of the Council on the requested deferrals for the Kenyan cases. That being said, from the official statements that were made about these requests it can be concluded that there was no agreement among the members of the Council on when or how Article 16 should be employed. In fact, it appears that states have taken at least four different positions on the interpretation and application of Article 16.[146]

A first group of states, including members of the AU, have argued that the Council can invoke Article 16 to prevent that the Court's proceedings have negative effects on matters related to

[144] Other relevant statements of a later date include the statements of Ethiopia (on behalf of the AU) in ASP, General Debate 2015; Lesotho (on behalf of the African states parties), Namibia and Tanzania in ASP, General Debate 2014; Angola in UNSC, S/PV.7478, 29 June 2014; Rwanda and Egypt in UNSC, S/PV.7285, 23 October 2014; and Algeria in UNGA, A/69/PV.35, 31 October 2014.

[145] AU Assembly, Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court, Assembly/AU/Dec.493 (XXII), 30-31 January 2014, para. 8.

[146] Note that for the purpose of interpretation, one should be careful to consider the positions taken by states parties, whereas the views of non-parties are irrelevant under Article 31(3)(b) of the VCLT. This section studies the positions that both states parties and non-parties have taken on the interpretation and application of Article 16 to get a better understanding of the Council's decision-making on deferral requests, rather than to add to the above-given interpretation of the legal scope of Article 16.

international peace and security. In their view, the Council can suspend an investigation or prosecution when this is deemed necessary in light of a complex security situation or a fragile political climate. The Court's involvement does not by itself have to constitute a threat to the peace in the sense of Article 39. They consider the possibility that these proceedings have undesirable consequences on peace-building or reconciliation efforts a sufficient justification for what may be labelled as a *preventive or precautionary deferral*.

This is the type of deferral that the AU proposed for al-Bashir in July 2008. During the Council's debate on UNAMID, the states supporting a deferral, including China, Russia and South Africa, argued that if the PTC would issue a warrant, this could lead to a 'possible negative development of events' in Darfur, Sudan and the wider region.[147] They did not say that the Prosecutor's move already harmed the peace negotiations. They argued for a precautionary suspension of al-Bashir's prosecution in order to prevent a possible escalation of the situation in the future.

Similar arguments were made with regard to the trials of Kenyatta and Ruto in 2013. In support of a deferral of their prosecution, several states parties and non-parties claimed that these trials should be postponed to ensure that President and Deputy President of Kenya would not be constrained in the exercise of their constitutional responsibilities and as such in their ability to fight terrorism in the region.[148]

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[147] See the statement of Vietnam, as well as the statements of China, Indonesia, Libya and Russia in UNSC, S/PV/5947, 31 July 2008. See also the statements of Algeria and Syria in UNGA, A/63/PV.13, 27 September 2008; Yemen in UNGA, A/63/PV.15, 29 September 2008; Ethiopia and Mauritania in UNGA, A/63/PV.16, 29 September 2008; China in UNGA, A/63/PV.20, 6 October 2008; Nigeria in UNGA, A/63/PV.35, 31 October 2008. Furthermore, Burkina Faso, China, Indonesia, Libya, Russia, South Africa and Vietnam made statements in support of a 'preventive deferral' in UNSC, S/PV/6028, 3 December 2008. Note that South Africa emphasized that Article 16 'can best be applied prior to issuing a warrant of arrest, so as to avoid interference with the judicial process'.

[148] See AU Assembly, Decision October 2013, para. 10, as well as the statements of Ethiopia, in UNGA, A/68/PV.8, 25 September 2013; of Tanzania in UNGA, A/68/PV.16, 27 September 2013; Azerbaijan, China, Ethiopia (as representative of the Chairperson of the AU), Kenya, Morocco, Pakistan, Russian, Rwanda and Togo in UNSC, S/PV.7060, 15 November 2013; Namibia, Nigeria, South Africa, Russia, Seychelles, Tanzania, Uganda (on behalf of the AU) in ASP, General Debate 2013.

A second position that some members of the Council have adopted on the interpretation and application of Article 16 is that the Council may issue a deferral whenever an investigation or prosecution of the ICC has an actual negative impact on matters related to international peace and security. According to this position, the effects of the Court's proceedings do not necessarily have to amount to a threat to the peace in the sense of Article 39. Yet, unlike a preventive deferral, the Court's involvement should already problematize the situation on the ground. The idea of such a *responsive deferral* is that the Council uses its deferral power to address the negative implications of the Court's proceedings, for example, when an indictment complicates the conclusion of a peace agreement.

This second view on the use of Article 16 can be found in some of the statements that were made in support of the AU's deferral request for al-Bashir after the PTC issued an arrest warrant in March 2009.[149] Upon the decision of the PTC, the AU and several members of the Council, including China and Russia, claimed that the prosecution of al-Bashir had 'negative effects for the political process, the deployment of [UNAMID] and [the provision of] humanitarian assistance'.[150] To address this negative impact of the ICC's involvement, the Council would have to delay al-Bashir's prosecution for a renewable period of twelve months.[151]

[149] See the statements of China, Libya and Russia in UNSC, S/PV/6170, 24 July 2009; Burkina Faso in UNSC, S/PV/6230, 4 December 2009; Mauritania and Yemen in UNGA, A/64/PV.12, 28 September 2009. AU Assembly, Decision July 2009, para. 3. Note that the AU Assembly also proposed a responsive deferral for Muammar Gadhafi, because his prosecution would have 'seriously complicate[d] the efforts aimed at finding a negotiated political solution to the crisis in Libya'. See AU Assembly, Decision July 2011, para. 11.

[150] Statement of China in UNSC, S/PV/6170, 24 July 2009. Note that after the PTC issued the arrest warrant for al-Bashir, the Sudanese Government expelled several humanitarian aid organizations from Darfur.

[151] See the statement of the AU in ASP, General Debate Review Conference 2010 (noting that 'as a direct consequence of the indictment, the political talks convened in Doha, Qatar, at the time between the Government of the Sudan and the Justice and Equality Movement (JEM) were suspended as the latter put additional conditions for their continuation').

A third position is that the Council's decision-making on Article 16 should be guided by the potential of a deferral to realize 'concrete actions for peace'.[152] According to this view, the Council should not exercise its deferral power to prevent certain events from happening or to address the negative effects of the Court's proceedings. A much better purpose for Article 16 is to use a deferral as a stick and/or carrot to promote the interests of peace, stability and the rule of law. This idea of an *instrumental deferral* builds on what Leslie Vinjamuri has described as the 'logic of engagement'.[153] It assumes that the possibility of a deferral engages indicted persons in peace negotiations, by giving them a strong incentive to negotiate a peaceful solution.

The possibility of an instrumental deferral has been explored, on more than one occasion, by the UK and France. Several reports indicate that in the autumn of 2008, London and Paris considered offering President al-Bashir a twelve-month deferral in exchange for Sudan's cooperation on other outstanding warrants of the ICC in the Sudan situation and full support for UNAMID.[154] Furthermore, in relation to a possible deferral for the former Libyan leader Muammar Gaddafi, which was tabled by the AU in 2011, representatives of the UK and France insinuated that a deferral could be part of a peace agreement in which Gaddafi relinquished power and left the country.[155] From the available sources, it cannot be verified, however, whether a deferral-for-peace deal was ever actually offered, either to al-Bashir or to Gaddafi.

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[152] Statement of the UK in UNSC, S/PV/6028, 3 December 2008. See also the statement of the UK in UNSC, S/PV/6170, 24 July 2009.

[153] Vinjamuri, 'The ICC and the Politics of Peace and Justice', p. 16.

[154] With respect to the deferral request for al-Bashir, David Bosco has noted that 'French diplomats reportedly circulated a working paper to Sudanese officials outlining the possible deal', but that 'London and Paris [never] decided to support a deferral Resolution'. He quoted Mark Malloch Brow, the UK's point person on Africa at the time as saying that 'any discussions were highly tentative - I wasn't in a position to offer it and the Sudanese weren't sure they want to accept it'. Bosco, *Rough Justice*, pp. 144-148.

[155] See Richard Norton-Taylor and Chris Stephen, 'Gaddafi can't be left in Libya, says international criminal court', *The Guardian*, 26 July 2011; Mark S. Ellis, 'Peace for All or Justice for One?', *The New York Times*, 11 August 2011.

Finally, the last and certainly most conservative position on the interpretation and the application of Article 16 is that the Council should only use its deferral power as *a measure of last resort*, in cases of extreme threat.[156] According to some states, the possibility of a deferral should solely be considered when the continuation of the Court's proceedings poses by itself a threat to the peace in the sense of Article 39 and even then, only when there are no alternative measures to accommodate this threat. This is the position that several states parties, including Belgium, the UK and Italy, have taken in response to the proposed deferral for al-Bashir, and especially in the debate on the deferral requests for Kenyatta and Ruto.[157] In their view, these requests could not be endorsed because they did not fulfil the (legal) requirements of Article 16, because there would not be a threat to the peace and because not all alternatives would have been exhausted.[158]

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[156] Verduzco argued on the basis of interviews that one of the reasons why certain states accepted the inclusion of Article 16 in the Statute was that a leading negotiator sketched a scenario during the drafting process 'in which an unyielding prosecutor was ready to proceed with an arrest warrant against [a rebel leader who has taken control over] a nuclear plant who [has] left instructions to his subordinates to activate a nuclear bomb in case he [is] indicted by the ICC'. Verduzco, 'ICC and Security Council', p. 58.

[157] On the proposed deferral for al-Bashir, see the statements of Belgium, Costa Rica and Croatia in UNSC, S/PV.5947, 31 July 2008. See also the statements of Costa Rica in UNGA, A/63/PV.8, 24 September 2008; of Belgium in UNGA, A/63/PV.13, 27 September 2008; of Botswana in UNGA, A/63/PV.15, 29 September 2008; of Australia and Switzerland in UNGA, A/64/PV.35, 31 October 2008; and of Belgium, Costa Rica, Croatia and Italy in UNSC, S/PV/6028, 3 December 2008. On the proposed deferral for Kenyatta and Ruto, see the statements of Argentina, Australia, Guatemala, Luxembourg, South Korea and the UK in UNSC, S/PV.7060, 15 November 2013.

[158] *Ibid.* Some states have even gone a step further than the idea of a deferral as a measure of last resort. They have cautioned in response to the AU's deferral requests that any deferral sets a dangerous precedent and poses a direct threat to the Court's independence. By proclaiming that 'there can be no lasting peace without justice' and that the Council should not pose any 'impediment to the free and independent work of the Court', these states have suggested that Article 16 should never be invoked. See, for example, the statements of Argentina, Guatemala and South Korea in UNSC, S/PV.7060, 15 November 2013. See also Amnesty International, 'Statement and recommendations on the Open Debate of the Security Council on Peace and Justice', 16 October 2012 ('Deferrals under Article 16 are inconsistent in all cases with the spirit and purpose of the Rome Statute').

D. A convincing interpretation of Article 16?

There are different ways to assess the Council's decision-making on the AU's deferral requests. One way is to fall back on the idea that the prosecution of international crimes should be assessed on the basis of the expected or actual effects of prosecution on the interests of peace and stability. The responses of the Council to the AU's peace concerns could be evaluated by looking at the Council's appraisal of the situation at the moment of its decision-making (*ex tunc*), or on what later turned out to be the impact of the Court's proceedings on peace negotiations or post-conflict reconstruction (*ex post facto*). For example, it may be asked whether there was, in retrospect, a significant risk in July 2008 that the continuation of al-Bashir's prosecution could undermine the peace process in Darfur or it may be questioned whether the Court's decision to issue a warrant for his arrest did actually jeopardize the interests of peace.

From a legal point of view, however, the perceived or actual effects of prosecution are irrelevant. As explained above, Article 16 does not provide much guidance on the kind of circumstances that justify a deferral. The text of Article 16 includes four procedural conditions, but does not entail any substantive criteria for the use of this provision. The Statute's preparatory work confirms that Article 16 gives the Council a discretionary power and that it is for the Council to decide if and when to invoke this power. Under the Statute or the Charter, there is no obligation for the Council to issue a deferral in a given situation. Article 16 requires the Council to adopt a Resolution in accordance with Chapter VII, which implies that the Council has to determine the existence of a threat to the peace before deciding on a deferral. Yet, the Council is under no obligation to make a determination under Article 39, and when making such a determination the Council is more or less free to decide on the appropriate measures.

In the absence of an obligation to issue a deferral, a refusal of the Council to adopt a deferral cannot be challenged on legal grounds. Even if it could be proven that the prosecution of al-Bashir undermined the interest of peace in Darfur, the Council acted in accordance with the Statute and the Charter when it remained silent on the AU's deferral request. In a similar vein, the Council's negative decision on the proposed deferral for Kenyatta and Ruto may be criticized on political grounds, but this decision is, legally speaking, beyond questioning.

That said, the 'legal' arguments that some states parties have advanced in opposing the AU's deferral requests can be scrutinized. Ideas of a preventive, responsive or instrumental deferral fall within the scope of Article 16, because they recognize the Council's discretion to decide whether the existence of a threat to the peace calls for a deferral. Yet, the idea of some states parties that a deferral can only be issued as a measure of last resort is based on a questionable interpretation of the Council's power to defer.

The underlying claim of the respective states is that Article 16 is only applicable if the continuation of an investigation or prosecution poses by itself a threat to the peace in the sense of Article 39. As explained above, however, the reference in Article 16 to Chapter VII does not limit the Council's deferral power to this extent. Under the Charter, the Council has a wide discretion to choose the appropriate measure when it has determined that a certain situation constitutes a threat to the peace under Article 39. The Statute does not limit the Council's power to choose a deferral as one of these measures. Neither the text nor the drafting history of Article 16 gives any indication that the Council's discretion to adopt a deferral under the Statute is somehow limited to a specific threat to the peace. From a policy-oriented perspective, it is an open question whether it is appropriate to limit the Council's deferral power to situations in which the continuation of an investigation or prosecution poses by itself a threat to the peace. Yet, legally speaking, there is no reason why the Council cannot adopt a deferral in reference to a larger factual or political background than the Court's investigation or prosecution.

In sum, the Council was certainly allowed to reject the AU's deferral requests under Article 16. The Council has no obligation to issue a deferral in any situation and the refusal of states to support the proposed deferral can therefore not be questioned on legal grounds. However, the argument of some states parties that Article 16 could not be invoked in the case of Kenyatta and Ruto because the continuation of their prosecution did not by itself constitute a threat to the peace should be rejected. The underlying interpretation of Article 16 is unconvincing because this provision does not specify the circumstances under which the Council should suspend an investigation or prosecution, or how a certain situation should relate to the Court's proceedings.

III. The Potential Deferral Power of the Prosecutor

Under the Rome Statute, the Security Council is the primary forum to address concerns about the negative effects of the Court's proceedings on the interests of peace. The Council's limited response to the AU's deferral requests has raised the question, however, whether other actors could also play a role in mediating the interests of peace and prosecution. In the literature, and in the political arena of the ASP, two proposals for an alternative deferral mechanism have been introduced to complement the Council's deferral power under Article 16. First of all, it has been suggested that the Prosecutor could use her wide discretion under Article 53 of the Statute to defer the Court's proceedings whenever the initiation or continuation with an investigation or prosecution frustrates the interests of peace.[159] Second of all, the AU has asked the ASP to amend Article 16. In search of a more accessible deferral mechanism, the AU itself has argued that the General Assembly should receive the power to defer an investigation or prosecution in case the Council fails to respond to a deferral request within six months of its receipt.

The discussions on the first proposal for an alternative deferral mechanism concentrate on the interpretation and application of Article 53, and specifically paragraphs 1(c), 2(c) and 3(b), which state that:

> 1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
>
> …

[159] For example, in his address to the ASP in 2013, Charles Jalloh stated that 'if [he would be] a Court official like the Prosecutor, [he] would prefer to act using [his] statutorily conferred power over transferring the discretionary decision to a quintessentially body such as the UNSC'. Jalloh, Reflections on the Indictment of Sitting Heads of State, 54-55. On at least one occasion, AU member states have also argued that the Prosecutor should 'include factors of promoting peace' in her decision-making under Article 53. AU Executive Council, Report on the Ministerial Meeting on the Rome Statute of the International Criminal Court, EX.CL/568 (XVI), 25-29 January 2010. According to this report, four African states parties (Burkina Faso, Namibia, Senegal and South Africa) spoke out in favour of including the promotion of peace in the prosecutorial guidelines on Article 53 during the 2009 meeting of the ASP.

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

…

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

…

3. (b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

Under these three paragraphs, the Prosecutor has a great latitude not to initiate or proceed[160] with an investigation or prosecution when this is not in 'the interests of justice'.[161] Like with Article 16, the

[160] Note that both Article 53(1)(c) and Article 53(2)(c) only speak of the decision *not to initiate* an investigation or prosecution. These paragraphs should, however, be read in line with Article 53(4), which states that the 'the Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information'. This provision makes clear that if there are new facts or information the Prosecutor also has the discretion *not to continue* with an investigation or prosecution when this would not be in the 'interests of justice'.

[161] Note that this is considered a '*countervailing* consideration that might produce a reason *not* to proceed' even where positive determinations have been made on both jurisdiction and admissibility. OTP, Policy Paper on the Interests of Justice, September 2007, pp. 2-3. In this regard, the OTP has argued that 'there is a strong presumption that investigations and prosecutions will

drafters did not specify the kind of circumstances under which the Prosecutor should defer the Court's proceedings.[162] They agreed that the Prosecutor should not pursuit criminal justice in an 'idyllic meta-political sphere' and that there should be some form of prosecutorial discretion in the Statute.[163] Yet, according to the available reports, they held 'sharply clashing views' on the kind of circumstances under which the Prosecutor should defer an investigation or prosecution.[164] For this reason, the drafters left it to the Prosecutor and potentially the Court's judges to define the substantive scope of Article 53.[165]

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be in the interests of justice and [that] a decision not to proceed on the grounds of the interests of justice would be highly exceptional'. OTP, Policy Paper on Preliminary Examinations, November 2013.

[162] The UK introduced the interests of justice element in a discussion paper during the preparation track of the Rome Conference. This paper called for a provision reflecting a 'wide discretion on the part of the prosecution to decide not to investigate or prosecute' when this would not serve the 'interests of justice'. See UK Delegation at the Preparatory Committee of the ICC, Discussion Paper, 29 March 1996, para. 30. The discussion paper mentioned the example of a very old or ill suspected offender and in a more general sense about 'otherwise good reasons to conclude that a prosecution would be counter-productive'. For further discussion on the drafting history of Article 53, see Schabas, 'Commentary', pp. 655-671.

[163] Payam Akhavan, 'Are international criminal tribunals a disincentive to peace?: Reconciling judicial romanticism with political realism' (2009) 31 *Human Rights Quarterly* 629.

[164] Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 *European Journal of International Law* 483.

[165] Article 53(1)(c) makes clear that the Prosecutor should be informed about a decision of the Prosecutor not to open an investigation which is solely based on the interests of justice must be informed to the PTC (which is not required in relation to a decision not to open an investigation on the basis of matters under Article 53(1)(a) or (b)). By contrast, any decision not to proceed to a prosecution must be notified to the PTC. The PTC only has the power to review *proprio motu* in matters where a decision not to investigate or to proceed to a prosecution is solely made in relation to the interests of justice, as provided under Article 53(3)(b). If the PTC decides to review, then the Prosecutor's decision shall only be effective once it is confirmed by the PTC. Arguably, the PTC could develop a substantive threshold for the Prosecutor's consideration of the interests of justice at different stages of the proceedings. Until now, however, the judges have not identified any substantive limits in their rulings. This possibility is, for example, considered in Alexander K.A. Greenawalt, 'Justice without politics? Prosecutorial discretion and the International Criminal Court' (2007) 39 *New York University Journal of International Law and Politics* 658-659.

A. The Prosecutor's initial interpretation of Article 53

Upon the entry into force of the Statute in 2002, Article 53 immediately gained a lot of attention and commentators began to discuss when the Court's involvement would not be in the interests of justice. One of the main questions that caught attention was whether Article 53 allowed the Prosecutor to stop an investigation or prosecution in order to accommodate amnesties or an alternative justice mechanism, like a truth commission or a traditional reconciliation ceremony.[166] Moreover, it was asked whether Article 53 would enable the Prosecutor to consider, more broadly, the interests of peace, stability and the rule of law. In addressing these questions, some commentators argued that the Prosecutor could decide not to initiate or continue with an investigation or prosecution in light of 'threats to the security of a fragile transitional state' or the existence of a peace treaty.[167] Yet, others strongly challenged the

[166] See, for example, Richard Goldstone and Nicole Fritz, ''In the Interests of Justice' and Independent Referral: The ICC Prosecutor's Unprecedented Powers' (2000) 13 *Leiden Journal of International Law* 660-662 (noting 'that amnesties, which adhere to internationally accepted guidelines are consistent with the interests of justice' and 'the prosecutor may … defer to domestically enacted amnesty processes'); Robinson, 'Serving the Interests of Justice', 481 (arguing that 'it is at least conceivable that the ICC could conclude that it would not be in the 'interests of justice' to interfere with a democratically adopted, good faith alternative programme that creatively advanced accountability objectives'); John Dugard, 'Possible Conflicts of Jurisdiction with Truth Commissions', in Antonio Cassese, Paola Gaeta and John Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), p.702 (arguing that 'a genuine amnesty may be protected by prosecutorial discretion' under Article 53).

[167] See, for example, Avril McDonald and Roelof Haveman, 'Prosecutorial Discretion - Some Thoughts on 'Objectifying' the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC', 15 April 2003 (arguing in the context of Article 53 that 'the Prosecutor might for example consider … security issues ... threats to the security of a fragile transitional state ... political issues, including the existence of a peace treaty, amnesties … and a TRC'); Matthew R. Brubacher, 'Prosecutorial Discretion within the International Criminal Court' (2004) 2 *Journal of International Criminal Justice* 81 (concluding that the interests of justice element 'requires the Prosecutor to take account of the broader interests of the international community, including the potential political ramifications of an investigation on the political environment of the state over which he is exercising jurisdiction' and noting that 'this consideration will be similar to that made by the Security Council in determining whether a situation is a threat to international peace and security'); Kai Ambos, 'The legal framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC', in Kai Ambos, Judith Large and Marieke Wierda (eds.), *Building a Future on Peace and Justice* (Berlin: Springer, 2009), p. 70 (noting that 'whether one likes it or not … justice

idea that Article 53 provides a plausible avenue to address the interests of peace.[168]

Amidst these different ideas, the OTP initially took a 'peace-including interpretation' of Article 53. In its first Draft Regulations (June 2003), the OTP stated that the interests of justice element requires the Prosecutor to determine whether the start of an investigation could destabilize a conflict situation or might otherwise seriously endanger the successful completion of a peace process.[169] Upon circulating the draft Regulations, however, this peace-including interpretation of Article 53 was strongly criticized by NGOs like Human Rights Watch (HRW) and Amnesty International.[170] HRW claimed that 'a

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interests cannot be limited to the interests of a criminal prosecution excluding *a limine* their possible interests in peace, traditional reconciliation etc.'); Philippa Webb, 'The ICC Prosecutor's Discretion Not to Proceed in the "Interests of Justice"' (2005) 50 *Criminal Law Quarterly* 338 (arguing that 'assessing how international peace and security concerns impact on 'interests of justice' will be a vital, yet sensitive aspect of the Prosecutor's decision-making process').

[168] See, for example, Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 *Journal of International Criminal Justice* 719 (arguing that Article 53 is often incorrectly considered relevant 'for recognition of amnesties as alternative forms of justice'); Kenneth A. Rodman, 'Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court' (2009) 22 *Leiden Journal of International Law* 122 (warning that 'Article 53 is unlikely to be the vehicle for exercising such discretion, because it could subject the Court 'to political controversy and compromise its appearance of impartiality').

[169] Note that according to this first draft, the interests of justice element is not a countervailing factor, but an element on which the Prosecutor has to make a positive determination before proceeding with an investigation. During the first public hearing of the OTP (also in June 2003), the Draft Regulations were discussed by 120 international criminal law experts, who recommended on Article 53 that the OTP should develop 'clear criteria' for deferring proceedings in the interests of justice. Subsequently, the OTP drafted an internal memorandum on the scope of Article 53. The available reports confirm in this memorandum the Prosecutor partly equated the interests of justice with the impact 'on the stability and security of the country concerned' (as quoted from Mireille Delmas-Marty, p.9). See OTP, Summary of recommendations received during the first Public Hearing of the Office of the Prosecutor, convened from 17-18 June 2003 at The Hague; Mireille Delmas-Marty, 'Interactions between National and International Criminal Law in the Preliminary Phase of Trial at the ICC' (2006) 4 *Journal of International Criminal Justice* 9.

[170] HRW, 'Policy Paper: the meaning of the 'interests of justice' in article 53 of the Rome Statute', 1 June 2005; Amnesty International, 'Open letter to the Chief Prosecutor of the International Criminal Court: Comments on the concept of the interests of justice', 17 June 2005. In response to a request from the OTP to comment on the meaning of the interests of justice element during the OTP's biannual consultation with NGOs in December 2004, Amnesty International, HRW and the FIDH strongly

construction that permits consideration of a domestic amnesty, domestic truth commission or peace process … would be in principle at odds with the object and purpose of the Rome Statute, as set forth in its preamble'.[171] Moreover, both HRW and Amnesty International expressed concerns that the proposed approach would politicize the OTP and thereby 'undermine the legitimacy of the Court'.[172] In their view, the interests of peace would fall outside the scope of Article 53.

Despite the opposition of these prominent supporters of the Court, the OTP apparently followed a peace-including interpretation of Article 53 during the earlier stages of the Court's investigations in Northern Uganda and Darfur. In fact, between 2003 and early 2006, the OTP repeatedly suggested that it considered the interests of peace a central element of its decision-making on the initiation and continuation of the Court's proceedings. For example, when civil society groups and traditional leaders from Northern Uganda proclaimed in 2005 that the Court's investigation into the Lord Resistance Army (LRA) of Joseph Kony should be suspended 'until peace is achieved',[173] OTP officials foretold that if there would indeed be genuine peace negotiations, the Court's proceedings could perhaps be delayed to give these negotiations a better chance.[174] Furthermore, in the OTP's first report to the Security Council

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criticized this reading of Article 53. However, the American NGO Coalition argued that 'Article 53 empowers the prosecution quite widely to hold back on a prosecution for reasons of non-interference in a peace settlement'. In addition, two Congolese NGOs stressed the inseparability of peace and justice. See; FIDH, 'Reflexions sur la notion intérêts de ja justice au terme de l'article 53 du Statut de Rome', 1 June 2005; American NGO Coalition for the ICC, 'Interests of Justice Proposals', 1 May 2005; Action Sociale pour la Paix et le Développement, 'Commentaires sur l'intérêt de la Justice', 1 May 2005; Democratie et Civisme pour le Développment Intégration, 'Consultation sur l'intérêt de la justice - interpretation de l'Article 53 du Statut de Rome', 1 May 2005.

[171] HRW, 6.

[172] *Ibid.*, 14.

[173] International Crisis Group, 'Shock Therapy for Northern Uganda's Peace Process', 11 April 2005, pp. 5-6.

[174] See, for example, OTP, Statements by ICC Chief Prosecutor and the visiting Delegation of Acholi leaders from Northern Uganda, 18 March 2005 (speaking of a 'common goal to end violence'); International Crisis Group, 'Shock Therapy for Northern Uganda's Peace Process', p. 6-7 (referring to interviews with ICC officials who 'pointed out that even after warrants are issued, the peace process can continue. They note that the investigation could still be suspended at any time in the interests of justice'); Yves Sorokobi, as quoted in 'Uganda: ICC could suspend northern investigations - spokesman', *IRIN News*, 18

on its investigation into Darfur, Prosecutor Luis Moreno-Ocampo devoted an entire section to Article 53 and emphasized that his Office had 'carefully considered the over-all context in which investigations will take place and [had gathered] information … on efforts to restore peace and security [in] Darfur'.[175] In this way, Ocampo indicated that his Office stood ready to use its discretion under Article 53 to balance the interests of peace and prosecution.

B. The Prosecutor's revised interpretation of Article 53

In the course of 2006-2007, the Prosecutor revised his interpretation of Article 53 and Ocampo distanced himself from his earlier statements by stressing that the undefined interests of peace fall outside the scope of Article 53. This shift in the Prosecutor's rhetoric followed upon new accusations that the OTP jeopardized the chances of bringing peace and reconciliation to Northern Uganda by prosecuting the LRA leadership.

During high-level negotiations with the LRA in the summer of 2006, the Ugandan Government offered a conditional amnesty to the LRA commanders in exchange for their disarmament.[176] In reaction

April 2005 (ICC spokesman Sorokobi reportedly stated that 'if it is in the interests of justice to proceed with a peace agreement, the ICC is ready to suspend its investigations'); OTP, Statement by Luis Moreno-Ocampo, Informal meeting of Legal Advisors of Ministries of Foreign Affairs, 24 October 2005, p. 5 ('I believe that by working together [the OTP and local communities] we will help bring justice, peace and security for the people of Northern Uganda'). Note that these references to peace and security provoked the PTC to ask the Prosecutor in December 2005 if the OTP was considering a formal suspension of the proceedings under Article 53. In response, the Prosecutor stated that the OTP had not made any decisions regarding this provision. See *Situation in Uganda* (ICC-02/04-01/05-68), Decision to convene a status conference on the investigation in the situation in Uganda in relation to the application of article 53, 2 December 2005; *Situation in Uganda* (ICC-02/04-01/05-76), OTP Submission Providing Information On Status of the Investigation In Anticipation of the Status Conference To Be Held on 13 January 2006, 11 January 2006.

[175] OTP, Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno-Ocampo, to the Security Council pursuant to UNSCR 1593, 26 June 2005, p. 6.

[176] Emma Mutaizibwa, 'Govt happy Kony is for amnesty', *Daily Monitor*, 9 July 2006; 'Uganda rebel chief backs amnesty', *BBC News*, 9 July 2006.f

to this offer, the Prosecutor argued that he could not drop the warrants that the PTC had issued.[177] This would go beyond his legal mandate. In a public speech in June 2007, the Prosecutor explained that even though 'we can hear voices … asking the Prosecution to use its discretionary powers to adjust to situations on the ground … supposedly in the name of peace, ... these proposals are not consistent with the Rome Statute'.[178]

In September 2007, the OTP specified its revised and peace-excluding interpretation of Article 53 in a Policy Paper on the interests of justice.[179] In this non-binding paper, the OTP reasoned that while the Statute recognizes that the Security Council can address peace concerns in relation to the ICC (Article 16), the Statute does not allow the Prosecutor to address the interests of peace.[180] Based on the Statute's Preamble, the OTP contended that the interpretation of Article 53 should be guided by the objectives of the Court to put an end to impunity, to ensure that the most serious crimes of concern to the international community do not go unpunished and to guarantee a lasting respect for international justice.[181] Furthermore, the OTP referred to Article 16 as a relevant contextual factor. Together with the treaty's proclaimed object and purpose, this provision would show 'that there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the [OTP]'.[182] While the Prosecutor could consider 'issues of crime

[177] See, for example, Uganda: Kony will eventually face trial, says ICC prosecutor', *IRIN News*, 7 July 2006.

[178] OTP, Address by Luis Moreno-Ocampo at the International Conference 'Building a Future on Peace and Justice' in Nuremberg, 25 June 2007.

[179] OTP, Policy Paper 2007, p. 1.

[180] As stated in the Policy Paper, it 'does not give rise to rights in litigation and is subject to revision based on experience and in the light of legal determination by the Chambers of the Court'. The Paper only reflects the OTP's 'understanding of the conception of the interests of justice as mentioned in Article 53' and offers 'clarification in the abstract' (p. 1).

[181] *Ibid.*, p. 4.

[182] *Ibid.* p. 1.

prevention and security under the interests of justice … the broader matter of international peace and security [would not be] the responsibility of the Prosecutor'.[183]

C. A convincing interpretation of Article 53?

To what extent is this peace-excluding interpretation of the interests of justice element in Article 53 convincing? In my opinion, there are at least three reasons to question the Prosecutor's revised interpretation of Article 53. Most importantly, the Policy Papier (1) ignores several elements that are part of the direct context of the Prosecutor's discretion under Article 53 not to initiate or proceed with an investigation when this is not in the interests of justice. Furthermore, the peace-excluding interpretation of Article 53 (2) is based on a one-sided reading of the object and purpose of the Statute and (3) it overestimates the scope of the Council's deferral power under Article 16.

First of all, the Prosecutor's Policy Paper failed to consider the linkage to specific purposes of criminal prosecution in Article 53. In Article 53(1)(c), concerning the initiation of an investigation, the interests of justice element is placed in juxtaposition to 'traditional criminal justice considerations' like the gravity of the crimes and the interests of victims.[184] This signals that the interests of justice element cannot be limited to the traditional administration of justice, but should be interpreted in a broader manner. So much can be concluded for Article 53(2)(c) as well, which emphasizes that the Prosecutor should take '*all* the circumstances' into account when determining whether the initiation or continuation of a prosecution is in the interests of justice (emphasis added). This contextual element strongly suggests that broader considerations, such as the undefined interests of peace, could be part of the Prosecutor's decision-making on the interests of justice.

[183] *Ibid.,* p. 9. With respect to 'other justice mechanisms' the OTP stressed 'the need to integrate different approaches' and stated that 'the pursuit of criminal justice provides [only] one part of the necessary response to serious crimes of international concern' (p. 7).

[184] Robinson, 'Serving the Interests of Justice', 488. See also Drazan Dukic, 'Transitional Justice and the International Criminal Court: in 'the interests of justice'?' (2007) 89 *International Review of the Red Cross* 699.

A second reason to question the Prosecutor's peace-excluding interpretation of Article 53 is that the OTP's analysis of the object and purpose of the Statute is incomplete. While the Policy Paper emphasizes the importance of prosecution to end impunity in reference to paragraphs four and eleven of the Preamble, the Paper ignores the third paragraph of the Preamble, which states that international crimes 'threaten the peace, security and well-being of the world'.[185] This paragraph indicates that the promotion of peace forms an important part of the object and purpose of the Statute as well.[186] Moreover, and more to the point, even if the prosecution of international crimes to end impunity were to be taken as the guiding object and purpose of the Statute, this goal does not necessarily support the conclusion that Article 53 should be interpreted in a peace-excluding manner. A temporal ban on the initiation or continuation of an investigation or prosecution in the interests of justice and/or peace does not mean that the relevant case will never again be taken up by the ICC or by another court.[187] While justice will (generally) not be achieved in a conflict situation or in a politically unstable or failing state, a delay in justice to ensure peace can prevent the creation of new victims and offer the possibility for justice further along the way.

Finally, contrary to what is claimed in the Policy Paper, Article 16 does not bar the Prosecutor from addressing the interests of peace. Article 16 gives a discretionary power to the Council, but does not preclude other institutions, such as the Prosecutor, the General Assembly or the ASP, from dealing

[185] Furthermore, in defining the object and purpose of the Rome Statute one should take into account the seventh paragraph of the Preamble, which reaffirms 'the Purposes and Principles of the Charter of the United Nations'. Article 1(1) of the UN Charter makes clear that the maintenance of international peace and security is one of these purposes. Arguably, the implication is that the ICC should also seek to support this purpose.

[186] See also Schabas, 'Commentary', pp. 42-43. He argued in reference to the third and seventh paragraph of the Preamble, 'that there is much to be said for the view that the rationale for the Court is to promote peace … the claim that justice is necessary for a lasting peace does not seem to constitute a universal truth … The preambular references can provide a useful corrective, recalling that peace and justice go hand in hand. Both objectives are best promoted by an approach that seeks to deliver as much of each as possible in the circumstances of a particular conflict'. *Contra* Condorelli and Villalpando, 'Referral and Deferral by the Security Council', p. 631.

[187] Moreover, 'ending impunity' does not necessarily require retributive justice in the form of criminal prosecution. For further discussion on this matter, see the references in footnote 166 of this chapter.

with the interests of peace. Under the UN Charter, the Security Council has a primary, but not an exclusive responsibility for the maintenance of international peace and security.[188] Article 16 recognizes this primary responsibility. Yet, neither the text nor the drafting history of Article 16 indicates that the Council's deferral power somehow prohibits the Prosecutor to address the interests of peace.

All of these additional considerations should be taken into account for the interpretation of Article 53. They suggest that the Policy Paper has defined the scope of the Prosecutor's discretion under this provision in a too limited manner.[189] As a starting point, it should be acknowledged that the text of Article 53, and especially the interests of justice element, is far from clear and has different possible meanings.[190] The task for an interpreter is to choose in good faith between these meanings and the first tool that should be used under Article 31 of the VCLT is the direct context of the specific terms. In my opinion, the direct context of the interests of justice element in Article 53(1)(c) and 53(2)(c) speaks strongly in favour of a broad interpretation of the interests of justice, which leaves it to the Prosecutor to decide what the interests of justice are in a particular situation. This especially holds true for a decision on the initiation or continuation of a prosecution, because Article 53(2)(c) requires the Prosecutor to address 'all the circumstances'. Depending on the unique and exceptional character of a situation, this may also require the Prosecutor to address the undefined interests of peace.

[188] See Article 12(1) and Article 24 of the UN Charter. For further discussion and references, see part IV in this chapter.

[189] In this regard, I agree with William Schabas that the OTP has tried 'to impose a literal approach on an expression that was intended to leave the exercise of prosecutorial discretion unfettered'. Indeed, as he and others have highlighted some legal concepts are not to be codified, 'but require the exercise of common sense and good judgment by responsible professionals'. William A. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 *Journal of International Criminal Justice* 749.

[190] Note that the term 'justice' and the phrase the 'interests of justice' is also used in different ways in other provisions of the Statute. In some instance, justice is used with a punitive connotation. For example, Article 17(2)(b) speaks of 'an intent to bring the person concerned to justice'. In other instances, the use of the phrase the interests of justice refers to the good administration of justice. For example, Article 55(2)(1) provides that a person can be assigned legal assistance 'in any case where the interests of justice so require'.

A broad and peace-including interpretation of the interests of justice element in Article 53 is confirmed by the drafting history of this provision. The drafters agreed that the Prosecutor should enjoy a form of prosecutorial discretion. As with Article 16, however, they did not agree on the kind of circumstances that could justify a deferral of an investigation or prosecution in the interests of justice. The open-character of the interests of element in Article 53 should be understood as an expression of the desire of the drafters to leave it to the Prosecutor and potentially the Court's judges to define the substantive scope of this discretion. In other words, it seems that the Prosecutor does have the power to consider the undefined interests of peace in its decision-making on whether the initiation or continuation of a particular investigation or prosecution is in the interests of justice.

D. The 'a-political' response of the Prosecutor to the AU's peace concerns

The Prosecutor's own peace-excluding interpretation of Article 53 should perhaps not just be understood as a product of doctrinal analysis.[191] The Policy Paper on the interests of justice may be seen as part of a broader legitimization strategy, whereby the OTP seeks to depict its decision-making process as 'a-political'.[192] By emphasizing the responsibility of the Security Council under Article 16, and by interpreting Article 53 in such a way that the Prosecutor has no legal mandate to address peace concerns, the OTP has tried to distance itself from any form of deferral politics. The underlying logic behind this strategy is that if the Prosecutor were to acknowledge any potential involvement with negotiations on the suspension of the Court's proceedings, this could expose the OTP to the critique that its decisions

[191] The OTP's peace-excluding interpretation of Article 53 has been confirmed in OTP, Policy Paper on Preliminary Examinations, November 2013, paras. 67-71. This paper stated in relation to Article 53 that 'the interests of justice provision should not be considered a conflict management tool requiring the Prosecutor to assume the role of a mediator in political negotiations: such an outcome would run contrary to the explicit judicial functions of the Office and the Court as a whole'.

[192] On the OTP's strategy to portray its decision-making as a-political, see generally Michael Struett, 'Why the International Criminal Court Must Pretend to Ignore Politics' (2012) 26 *Ethics & International Affairs* 83-92; James A. Goldston, 'More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court' (2010) 8 *Journal of International Criminal Justice* 383-406.

are politically motivated.[193] To protect the legitimacy of the Court from these kind of accusations, the OTP has stated many times that the Prosecutor's duty is 'to apply the law without bowing to political considerations'.[194]

It is along these lines that the Court's first two chief prosecutors have responded to the AU's peace concerns about the ICC. To give an example, in the context of a public address in October 2012 titled 'Setting the record straight: The ICC's new Prosecutor responds to African concerns', Fatou Bensouda argued that the Court's involvement in Africa has never 'precluded or put an end to' peace negotiations, but has rather proven to be 'a spur to action'.[195] She added that even if the Court's

[193] This strategy reflects the much debated idea that international criminal investigations and prosecutions must be dictated 'by pure legal standards' free from political influences. Note that various scholars have contended that this is a purely 'theoretical construction', which contrasts strongly with the inherent political elements in the decision-making process of the Prosecutor and the Court as a whole. See, for example, Kendall, 'UhuRuto and Other Leviathans' 401-405; Goldston, 'More Candour about Criteria', 1-5; Clarke and Koulen, 'The Legal Politics of the Article 16 Decision' 297-303; Sarah M.H. Nouwen and Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2011) 21 *European Journal of International Law* 942-946.

[194] Luis Moreno-Ocampo, 'The International Criminal Court: Seeking Global Justice' (2007) 40 *Case Western Reserve Journal of International Law* 224 ('The Prosecutor's duty is to apply the law without bowing to political considerations, and I will not adjust my practices to political considerations. It is time for political actors to adjust to the law. We have no police and no army, but we have legitimacy. We will prevail'). See also the statement of Phakiso Mochochocko on behalf of the OTP to the Security Council in UNSC, S/PV.6849, 17 October 2012 ('Efforts to interfere with the independent exercise of the Office's mandate would only serve to undermine the legitimacy and credibility of the judicial process, thus giving credence to allegations of politicization of the process'); OTP, Statement by Luis Moreno-Ocampo during informal meeting of the [ASP] on the occasion of the commemoration of the 10th anniversary of the adoption of the Rome Statute of the ICC, 17 July 2008; OTP, Keynote address Mrs. Fatou Bensouda - Setting the record straight the ICC's new Prosecutor responds to African concerns, 10 October 2012, p. 4; OTP, Statement by Luis Moreno-Ocampo - 'Working with Africa: the view from the ICC Prosecutor's Office', 9 November 2009, p. 5; OTP, Statement by Luis Moreno-Ocampo to the [ASP], 14 November 2008; OTP, Statement by Luis Moreno-Ocampo to the [ASP], 6 December 2010 ('politics have no place and will play no part in the decisions I take'); OTP, Statement by Fatou Bensouda to the [ASP], 20 November 2013 ('politics have no place and will play no part').

[195] OTP, Prosecutor responds to African concerns, p. 7. See also OTP, Key note address Mrs. Fatou Bensouda - New power balances: actors for the future and challenges ahead, 23 May 2013, p. 6.

investigations or prosecutions would at some point jeopardize the interests of peace, the OTP could not 'participate in peace initiatives'.[196] In support, she recalled the 2007 Policy Paper and stressed that the interests of justice element in Article 53 should 'not be confused with the interests of peace and security, which falls within the mandate of other institutions, notably the UN Security Council'.[197] The Prosecutor would 'solely [be] responsible for doing justice'.[198]

In addition to these kind of general observations on the role of the OTP in balancing the interests of peace and prosecution, Ocampo and Bensouda have on several occasions responded to the AU's deferral requests under Article 16. Both have noted that 'the reasons for which these powers may be exercised are clearly a matter for the Security Council members themselves and are not issues with which the Court and the [OTP] can or should be involved'.[199] At the same time, Ocampo has warned the Council, in relation to the deferral request for al-Bashir that the Sudanese President has tried to 'blackmail' the international community with the 'false option' of peace or justice.[200] In a similar vein, Bensouda has noted that 'there can be obvious perverse side-effects for deferring judicial proceedings in the name of peace and security', and that a deferral may 'send out a message to perpetrators that arrest warrants can be stayed, if only they commit more crimes or threaten regional peace and security'.[201]

With these kind of statements on the AU's deferral requests, the OTP has not only sought to distance its own decision-making from deferral politics, but has also discouraged the Council from using Article 16. The OTP has manifested itself in this respect as a political actor and as an advocate of the

[196] OTP, Prosecutor responds to African concerns, p. 5.

[197] *Ibid.*

[198] *Ibid.*

[199] See, for example, OTP, Prosecutor responds to African concerns, 5.

[200] OTP, Statement by Luis Moreno-Ocampo to the [ASP], 12 December 2011. See also his statement in UNSC, S/PV.6028, 3 December 2008 ('President al-Bashir is trying to convince organizations and the Security Council that they have to protect him. The international community cannot be part of such a cover-up … Enough appeasement: the time has passed for continuing to accommodate evil').

[201] OTP, New Power Balances, p. 7; OTP, Prosecutor responds to African concerns, p. 6 ('a deferral is not an amnesty, nor an offer of immunity from prosecution - it buys time perhaps, but it does not buy a way out for alleged war criminals').

unconditional pursuit of criminal justice. In the context of the AU's peace concerns, Ocampo and Bensouda have both stressed that the interests of peace are not part of the responsibility of the Prosecutor and that an investigation or prosecution should not be deferred because of political considerations.

In sum, several states and commentators have suggested that the Prosecutor could use her wide discretion under Article 53 of the Statute to defer the Court's proceedings whenever an investigation or prosecution jeopardizes the interests of peace. The OTP has, however, rejected this alternative deferral mechanism, because the interests of peace would fall outside the scope of Article 53. From a legal point of view, the underlying interpretation of the interests of justice element in this provision is not convincing. Based on the applicable rules of interpretation, it seems that Article 53 gives the Prosecutor a broad discretion to consider all possible circumstances, including the interests of peace. That being said, the OTP's Policy Paper on the interests of justice and the Prosecutor's a-political responses to the AU's peace concerns make it very unlikely that the Prosecutor will use its potential deferral power any time soon.

IV. The Potential Deferral Power of the UN General Assembly

In search for an alternative deferral mechanism, states and commentators have not only looked inside, but also outside of the Court's current legal framework (*de lege ferenda*). Obtaining the most attention in this respect is the AU's proposal to amend Article 16 and to give the UN General Assembly the power to defer an investigation or prosecution whenever the Council fails to respond to a deferral request within

six months of its receipt. This proposal, which was first adopted by a ministerial meeting of the AU in November 2009,[202] and introduced by South Africa in the ASP a few weeks later,[203] reads as follows:

i) No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council in a Resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions;

ii) A state with jurisdiction over a situation before the Court may request the UN Security Council to defer a matter before the Court as provided for in (i) above;

iii) Where the UN Security Council fails to decide on the request by the state concerned within six (6) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council's responsibility under para. 1 consistent with Resolution 377(V) of the UN General Assembly.

[202] AU Executive Council, Report January 2010, p. 12. The ministerial meeting (6 November 2009) also adopted six other recommendations that would have to guide the position of the African states parties to the ICC at the next meeting of the ASP and the Review Conference in 2010. These recommendations concerned the Prosecutor's discretion under Article 53 (discussed in the previous section), the referral power of the Security Council under Article 13(b) (arguing that these powers should be retained as is), the relation between Articles 27 and 98(1) (discussed in chapter 3), and proposals regarding the crimes of aggression (which was the main item on the agenda of the Review Conference). The AU Assembly endorsed the proposed amendment to Article 16 in early 2010. AU Assembly, Decision on the Report of the Second Meeting of States parties to the Rome Statute on the International Criminal Court, Assembly/AU/Dec.270(XIV), 2 February 2010, paras. 2, 5 and 7.

[203] The proposal was formally submitted by South Africa to the Secretary-General on 18 November 2009. Note that this amendment could not be formally considered by the ASP during its annual meeting in 2009, because it was not submitted three months prior to this session, as is required under Article 121(2) of the Statute. UN Treaties Collection (C.N.851.2009.TREATIES-10), South Africa: Proposal of Amendment, 18 November 2009. The intention of the AU seems to have been to introduce the amendment during the 2009 meeting of the ASP so that this proposal could be formally addressed by the ASP during the Review Conference in 2010. As was decided by the ASP in 2008, amendments to be considered by the Review Conference first had to be discussed during the 2009 meeting of the ASP 'with a view of promoting consensus and a well prepared Review Conference'. ASP, Resolution ICC-ASP/7/Res.3, 21 November 2008.

The AU's motivation to seek this amendment came, first of all, from the Council's disappointing response to the requested deferral for al-Bashir. However, it should not only be seen as an expression of frustration about this unsuccessful deferral bid. More than that, the amendment is a product of the strong perception among African leaders that the Security Council is an undemocratic and unrepresentative body, because African and other developing states have insufficient influence on its decision-making process.[204]

A. The legal basis of the AU's proposal in the UN Charter

From a legal point of view, the main issue with the AU's proposal is the division of competence(s) between the General Assembly and the Security Council. Under the UN Charter, the Council has the primary responsibility for the maintenance of international peace and security in order to ensure 'prompt and effective action' by the UN (Article 24). At the same time, the Charter makes it 'abundantly clear' that the General Assembly can also be concerned with questions relating to the maintenance of international peace and security.[205] To coordinate the respective functions of the General Assembly (as listed in Chapter IV) and the Security Council (as listed in Chapter VII), Article 12(1) of the Charter gives priority to the Council. This provision stipulates that when the Council 'is exercising' its functions, the General Assembly 'shall not make any recommendation with regard to' the relevant dispute or situation unless the Security Council requests the General Assembly to do so. This does not mean that the General Assembly cannot act with respect to a situation that is also on the agenda of the Council (or

[204] Note that the AU has repeatedly argued that the UN Charter should be amended in order to ensure a more equal composition of the Security Council. In March 2005, an extraordinary meeting of the Executive Council of the AU adopted the Ezulwini consensus, which argued that African states should have at least two permanent seats (including veto) and five non-permanent seats on the Security Council. It further specified that the AU should get to decide which African states should fulfil those seats. AU Executive Council, The Common African Position on the Proposed Reform of the United Nations: The Ezulwini Consensus, Ext/EX.CL/2 (VII), 7-8 March 2005.

[205] *Certain Expenses of the United Nations*, Advisory Opinion, [1962] ICJ Rep 151, at 163.

on which the Council has acted in the past).[206] Yet, according to the ICJ's jurisprudence on this matter, Article 12(1) does prohibit the General Assembly from issuing a recommendation on a matter that is actively being considered by the Council at the same time.[207]

In considering the AU's proposal, it must be acknowledged that the General Assembly cannot act beyond those powers that are attributed to it by the Charter. If the proposed amendment to Article 16 would create a new power for the General Assembly, which it does not have under the Charter, the adoption of this amendment under the Statute would require an additional amendment to the Charter in accordance with the established procedure of Chapter XVIII of the Charter. However, it seems that the proposed amendment to Article 16 would not grant a new power to the Generally Assembly under the Charter. In light of its own practice, it appears that the General Assembly is able to make a request to the ICC or another international court under Chapter IV of the Charter.[208] The 'only' thing that the proposed amendment would do, is to create a legal effect for such a request within the legal framework

[206] See generally Eckhart Klein and Stefanie Schmahl, 'Article 12', in Bruno Simma, Daniel-Erasmus Khan, George Nolte and Andreas Paulus (eds.), *The Charter of the United Nations - A Commentary* (Oxford: Oxford University Press, 2016, Third Edition), pp. 509-516.

[207] The ICJ has noted that 'both the General Assembly and the Security Council initially interpreted and applied Article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council's agenda [but] that this interpretation of Article 12 has evolved subsequently'. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136, para. 27. This position has been confirmed in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] ICJ Rep 403, paras. 41-42.

[208] According to the wording of Article 10 of the Charter, the General Assembly can only direct recommendations to the members of the UN, to the Security Council, or to both, whereas under Article 11(2) the General Assembly can also address recommendations to non-members. In practice, however, the General Assembly 'has not restricted itself to those named in Article 10 [or in Article 11(2)]'. Recommendations have, for example, been directed to 'special authorities', 'non-governmental organizations', 'individual persons' and specific international organizations. See Eckhart Klein and Stefanie Schmahl, 'Article 10', in Bruno Simma, Daniel-Erasmus Khan, George Nolte and Andreas Paulus (eds.), *The Charter of the United Nations - A Commentary* (Oxford: Oxford University Press, 2016, Third Edition), p. 478. In light of this practice, the General Assembly arguably possesses the power to address a request or recommendation to the ICC (which is itself a specific international organization).

of the Court.[209] If the proposed amendment to Article 16 would be adopted, a request of the General Assembly to defer a certain investigation or prosecution would become a valid request under the Rome Statute and would create a legal basis upon which an investigation or prosecution could be suspended.

Because of Article 12(1) of the Charter, the General Assembly would not be able to issue a deferral request when the Council is still actively considering the matter.[210] In an attempt to circumvent this limitation, the AU's amendment refers to the 'Uniting for Peace Resolution'.[211] The first paragraph of this Resolution 'resolves that if the Security Council, because of lack of unanimity of the permanent members fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making

[209] Note that a deferral request by the General Assembly does not require 'action' in the meaning of Article 11(2). This provision stipulates that when a question concerning the maintenance of international peace and security requires 'action', the General Assembly shall refer this question to the Council. On 'action' in the meaning of Article 11(2), the ICJ has stated that this must refer to action 'which is solely within the province of the Security Council', because if the word 'action' would be 'interpreted to mean that the General Assembly could make recommendations only of a general character affecting peace and security in the abstract, and not in relation to specific cases, [Article 11(2)] would not have provided that the General Assembly may make recommendations on questions brought before it by States or by the Security Council'. According to the ICJ, the last sentence of Article 11, paragraph 2, has 'no application where the necessary action is not enforcement action'. *Certain Expenses of the United Nations*, Advisory Opinion, [1962] ICJ Rep 151, at 164-165. A request to defer an investigation or prosecution does not fall within the scope of enforcement action. The consideration of a deferral request by the General Assembly does therefore not raise any problems under Article 11(2).

[210] The argument that the General Assembly cannot issue a deferral request when the Council is dealing with the underlying situation, rather than the deferral itself, is unconvincing. It runs counter to the accepted practice of the General Assembly, which has been confirmed by the ICJ. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136, para. 28 (noting that 'there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security'). In the concerned case, the Security Council was still dealing with the conflict between Israel and Palestine, but not with the more specific issue of the construction of the Wall, which was the subject of the request for an advisory opinion to the ICJ. See also Klein and Schmahl, 'Article 12', p. 511.

[211] UNGA, Resolution 377(V), 3 November 1950, para. 1.

appropriate recommendations'.[212] According to the ICJ's jurisprudence, the procedure provided for by this resolution is premised on the conditions (1) that the Council has failed to exercise its primary responsibility 'as a result of a negative vote of one or more permanent members', and (2) that the situation is one 'in which there appears to be a threat to the peace, breach of the peace, or act of aggression'.[213] If these conditions are fulfilled, the General Assembly would be allowed to make a recommendation even if the Council is still actively considering the matter.[214]

At first sight, the reference to this Resolution in the proposed amendment looks like a smart move. It seems to allow the General Assembly to issue a deferral when the Council is still actively considering the situation. Yet, there is at least one difficulty with the reference to the Uniting for Peace Resolution. As pointed out by Charles Jalloh, Dapo Akande and Max du Plessis, this reference may

[212] *Ibid.*, para. 1.

[213] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136, para. 30. See also *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] ICJ Rep 403, para. 42 (speaking of 'lack of unanimity', rather than 'a negative vote of one or more of the permanent members of the Security Council'). According to Klein and Schmahl (p. 512), the General Assembly determined the Uniting for Peace Resolution 'that if a veto cast by a permanent member prevent the Council from taking a decision, the Security Council will not be exercising its functions within the meaning of Article 12(1), and consequently the General Assembly will not be banned from making recommendations'. Note, however, that the Resolution itself does not speak of one or more negative votes, but more generally of a 'lack of unanimity of the permanent members'.

[214] Several commentators have noted that this interpretation is problematic because the Article 27(3) expressly grants the permanent members veto power and the exercise of this power 'is not necessarily aimed at paralyzing the security mechanism of the UN'. It may well be based on the conviction that there is no threat to the peace or that a State is wrongly accused of having committed an act of aggression (Art. 39). In such a case, the blocking of coercive measures against a (member) State can just be a reasonable exercise of the functions assigned to the Security Council. Moreover, this interpretation does not correspond with the text of the Resolution itself which speaks of a 'lack of unanimity of the permanent members'. The key question is whether 'the rejection of a resolution due to a veto is to be considered an exercise of SC functions' or whether the rejection of a resolution is the result of lack of unanimity of the permanent members. This question should probably be 'answered according to the judgment of the majority of the SC members'. See Klein and Schmahl, 'Article 12', pp. 512-513.

severely limit the potential deferral power of the General Assembly.[215] As interpreted by the ICJ, the Uniting for Peace Resolution only applies to situations where the Council has failed to take a decision because of a negative vote of one or more of the permanent members of the Security Council.[216] If this interpretation were to be accepted, it means that if the amendment to Article 16 would be adopted with the reference to the Uniting for Peace Resolution, deferral requests like those for al-Bashir (no actual vote in the Council) or for Kenyatta and Ruto (failed because of abstentions, rather than a negative vote from one or more permanent members) might fall outside of its scope. After all, these deferral requests did not fail because of a negative vote of one of the permanent members (*i.e.*, a veto). They failed because the Council as a whole, including non-permanent members, could not agree on the use of Article 16.[217]

All things considered, the AU's proposal to amend Article 16 is probably compatible with the UN Charter. Yet, if the amendment would be accepted (in accordance with the established procedure of Article 121 of the Statute) the General Assembly would only be able to use this provision under very

[215] Note that according to Jalloh, Akande and Du Plessis argued that 'the constitutional validity of [this] Resolution is questionable', because it assumes 'that the fact that the Council is unable to pass a Resolution through the lack of unanimity of the permanent members means that the UNSC is no longer exercising its functions with regard to a particular matter' in the meaning of Article 12(1), while 'it is possible, and in fact happens, that [when] the Council at first fails to pass a Resolution it is later able to do so'. Jalloh, Akande and Du Plessis, AU Concerns about Article 16, 34.

[216] *Ibid.*, 35 (arguing for this reason that 'the proposal would be more legally palatable if reference to the Uniting for Peace Resolution were omitted altogether'). See also Christopher Gevers, 'SA's bold proposal shows up the flaws in the Rome compromise', *Business Day*, 29 December 2009 (arguing that the reference to the Uniting for Peace Resolution 'is probably the amendment's death knell, as even sympathetic countries are unlikely to support employing the defunct Uniting for Peace Resolution in this legally questionable manner').

[217] If the existence of a threat of a veto would qualify as a 'lack of unanimity' rather than an actual veto, the deferral request for al-Bashir could, arguably, have been considered within the scope of the proposed amendment. As noted in part II of this chapter, the US threatened to use its veto over a deferral request for al-Bashir. In September 2008, US Ambassador Richard Williamson stated that 'if forced to vote today - the United States, even if it was 191 countries against one, would veto an Article 16 [Resolution]. See Daniel van Oudenaren, 'US Will Veto Attempts to Defer ICC Move against Sudan President', *Sudan Tribune*, 24 September 2008.

specific circumstances. In accordance with Article 12(1) of the Charter, the General Assembly would only be able to defer an investigation or prosecution when the Council is not actively considering the initial request, even after the envisioned period of six months has elapsed. Moreover, because of the reference to the Uniting for Peace Resolution, the deferral power of the General Assembly under the Statute would be limited to situations in which a deferral request has been rejected by the Council because of lack of unanimity of the permanent members.[218]

B. The response of the ASP to the AU's proposal

Following the informal introduction of the AU's amendment by South Africa during the annual meeting of the ASP in December 2009, the proposal was briefly debated by the Court's members. Reportedly, two African states (Namibia and Senegal) took the floor to support the initiative, whereas thirteen non-African states spoke out against a revision of Article 16.[219] Among other reasons, the opposing states argued that 'there was not enough time to assess the merit of the proposal and that discussion would be premature even at the Review Conference' in 2010.[220] Furthermore, concerns were expressed that the AU's amendment would broaden 'the scope for political interference with the activity of the Court',[221]

[218] Note that the General Assembly can also recommend a deferral without an amendment to the Statute. Within the accepted limits of Chapter IV of the Charter, including Article 12(1), such a recommendation will not bind the Court or UN member states. Under the legal framework of the Court, the Court's judges or the ASP can also not rely on this recommendation to defer a certain investigation or prosecution, because they do not possess this power under the Statute. However, the Prosecution could use this recommendation to invoke its existing deferral power under Article 53 of the Statute.

[219] AU Executive Council, Report January 2010, p. 20. Note that after the ASP, the Secretary-General received a letter from the Permanent Representative of Namibia to the UN communicating to him the decision of the Government of Namibia to co-sponsor the proposed amendment to Article 16.

[220] *Ibid.* p. 20-21, paras. 10-11.

[221] *Ibid.* Several commentators have expressed similar concerns. See, for example Kurt Mills, 'Bashir is Dividing Us: Africa and the International Criminal Court' (2012) 34 *Human Rights Quarterly* 429 (arguing that the amendment would likely politicize the ICC even more and make its actions even more uncertain'). *Contra* William A. Schabas, 'African Union Amendment to Article 16 of Rome Statute Analysed', *Human Rights Doctorate*, 31 October 2010 ('I don't see why making the politicisation of the Court more democratic by involving the General Assembly, aggravates a problem'); Schabas, 'Introduction', p. 186; Gevers, 'SA's bold proposal shows up the flaws in the Rome compromise'.

and that Article 16 is 'a unique solution designed to reflect the special role of the UN Security Council' and that an 'expansion of that ... carefully crafted negotiation ... would not serve the interests of the Court'.[222]

At the end of the ASP's meeting, it was decided that the AU's proposed amendment could be discussed after the Review Conference.[223] During the next annual meeting of the ASP (in late 2010), there was, however, no debate on this matter.[224] Instead, the ASP decided that it would first organize informal consultations to discuss this amendment, among others, in the context of a newly established working group on amendments.[225] In response to this decision, the AU Assembly called in February 2011 upon all African states parties to co-sponsor the amendment and to ensure that the AU's proposal would be 'properly addressed during the forthcoming negotiations'.[226] From the available reports of the working group, it appears, however, that these negotiations did not take place. The 2011 report of the working group discussed the consideration of several other amendments, but did not contain any information on the AU's proposal (apart from listing it in an annex).[227] Later reports of the working group indicate that the proposal was also not addressed during its subsequent meetings in 2012 and 2013.[228]

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[222] AU Executive Council, Report January 2010, paras. 10-11. Verduzco noted in this regard that the AU's proposal associates the possibility of a deferral 'with claims of legitimacy in decision-making'. In her opinion, this approach sits uneasily with the function of Article 16, which would not be to 'judge the necessity of action by 'democratic' methods', but to assess certain 'factual criteria, namely the existence of a threat to international peace'. Verduzco, 'ICC and Security Council', p. 58.

[223] ASP, Resolution ICC-ASP/8/Res.6, 26 November 2009, para. 4.

[224] Note that there was a stocktaking exercise during the Review Conference on peace and justice, but that the proposed amendment to Article 16 and the use of the Council's deferral power was not considered there. See ASP, Stocktaking of international criminal justice - peace and justice (moderator's summary), RC/11, annex V(b), 7 June 2010.

[225] See AU Assembly, Decision January 2011, para. 8. Note that this is not mentioned in the ASP's general resolution: ASP, Resolution ICC-ASP/9/Res.1, 10 December 2010.

[226] AU Assembly, Decision January 2011, paras. 8-9.

[227] ASP, Report on the Working Group on Amendments, ICC-ASP/10/32, 9 December 2011.

[228] ASP, Report on the Working Group on Amendments, ICC-ASP/11/36, 13 November 2012; ASP, Report on the Working Group on Amendments, ICC-ASP/12/44, 24 October 2013.

For a while, this seemed to be the end of the proposed amendment to Article 16.[229] Yet, in late 2013, the AU's campaign against the trials of Kenyatta and Ruto, and especially the Council's negative decision on the AU's deferral request under Article 16 gave new momentum to the proposal. In response to threats of an African 'mass withdrawal' from the ICC,[230] the ASP agreed to organise an interactive dialogue on the AU's peace concerns under the title 'Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation'.[231] In the context of this special segment and the AU's diplomatic efforts to seek a 'solution' for the trials of Kenyatta and Ruto, African states submitted a list of possible amendments to the Rome Statute and the Rules of Procedure and Evidence, including two possible amendments to Article 16.[232]

The first amendment was the same as the one formally submitted by South Africa in 2009, proposing to give the General Assembly the power to defer the Court's proceedings for those situations in which the Council would fail to act on a deferral request. In addition, during the public debate of the 2013 meeting of the ASP, Nigeria introduced a second possible amendment to Article 16. This proposal stipulates that the ASP itself could be vested with the power to grant a request for a deferral 'especially where the circumstances prevalent in the concerned state are grave and serious but may fall short of the

[229] Note that the AU and most of its member states remained silent on the amendment as well. The decisions of the AU Assembly in 2012 and 2013 did not refer explicitly to the proposed amendment, neither did the statements of African states on the ICC in the UNSC, the UNGA and the ASP. The only exception was the statement of Namibia in ASP, General Debate 2012.

[230] Statement of New Zealand in ASP, General Debate 2013. See also the statements of Australia, Brazil, Canada, Costa Rica, Czech Republic, Denmark, Finland, France, Germany, Italy, Japan, Jordan (also on behalf of Liechtenstein), Lithuania (on behalf of the EU), Luxembourg, Peru, Philippines, Portugal, Spain, Trinidad & Tobago and the US.

[231] On the background and structure of the special segment, see ASP, Recommendation by the Bureau for the inclusion of an additional item in the agenda of the twelfth session of the [ASP], ICC-ASP/12/1/Add.2, 18 November 2013. See also ASP, Special segment as requested by the African Union: 'Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation' - Informal summary by the Moderator, ICC-ASP/12/61, 27 November 2013.

[232] See annex II.

threshold required by [the Council] to act under Chapter VII of the UN Charter'.[233] This second proposal, which was not formally submitted to the Secretary-General, should be understood as a direct response to the Council's debate on the deferral request for Kenyatta and Ruto, in which several states argued that the request did not fulfil the requirements of Article 16, because the Court's involvement should by itself constitute a threat to the peace in the sense of Article 39 of the UN Charter. It is in those situations, according to Nigeria, that the ASP could play a role in balancing the interests of peace and prosecution.[234]

During its 2013 meeting, the ASP eventually decided to amend the rules on presence at trial to accommodate the AU's concerns about the trials of Kenyatta and Ruto.[235] Moreover, the ASP invited the working group on amendments 'to continue its consideration of amendment proposals, including all proposed amendments submitted prior to the Review Conference and those submitted following the decision by the Extraordinary Summit of the [AU] held on 12 October 2013'.[236]

After the ASP's meeting, the proposal on the potential deferral power of the General Assembly was indeed discussed by the working group on amendments.[237] During the respective meetings, South Africa provided 'further information' on the proposal, and according to the 2014 report of the working group, there was agreement among its members that the amendment raised 'numerous questions notably

[233] Statement of Nigeria in ASP, General Debate 2013. For a discussion of the feasibility of this proposal, see Dapo Akande, Max du Plessis and Charles Chernor Jalloh, 'Position Paper - An African expert study on the African Union concerns about Article 16 of the Rome Statute of the ICC', *ISS Africa,* 2010, pp. 17-18.

[234] Legally speaking such an amendment would be permissible if it would somehow acknowledge the Council's primary responsibility for the maintenance of international peace and security under Chapter VII of the UN Charter.

[235] The adopted amendments are discussed in chapter 4.

[236] ASP, ICC-ASP/12/Res.8, 27 November 2013, p. 66, para. 12.

[237] The amendment to Article 16, as initially introduced by South Africa was discussed by the working group in meetings on 20 May 2014 and 5 November 2014. Note that the AU Assembly decided in January 2014 that 'African States parties should comply with African Union Decisions on the ICC and continue to speak with one voice to ensure that the African proposals for amendments to Articles 16 and 27 of the Rome Statute of the ICC are considered by the ASP working Group on amendments as well as by the forthcoming sessions of the [ASP]'. AU Assembly, Decision January 2014, para. 12.

with regard to the relationship between the organs of the [UN] as well as on the relationship between the Court and the [UN] ... and that further discussions would be necessary'.[238] However, the available reports indicate that no further discussions took place in the context of the working group in 2015 and 2016.[239] In the absence of political urgency, it appears that the Court's states parties remain reluctant to debate let along adopt an amendment on the potential deferral power of the General Assembly.

In sum, the AU's proposal to amend Article 16 might be feasible from a legal point of view, but it lacks the necessary support in the ASP. If the amendment were to be accepted the General Assembly would only be able to use this provision when the Council is not actively considering the initial deferral request and only if this request would be rejected by the Council because of lack of unanimity of the permanent members. For the time being, however, it seems very unlikely that the ASP will be able to agree on this amendment or on any other alternative deferral mechanism. Despite repeated calls of the AU and of African states parties to the ICC to amend Article 16,[240] most other members of the ASP remain extremely reluctant to broaden the Court's current deferral regime.[241]

V. Conclusion: The ICC's Dysfunctional Deferral Regime

This chapter examined how the Security Council, the Prosecutor and the ASP have responded to the AU's peace concerns about the prosecution and trial of sitting Heads of State. From the decisions of the AU and the statements of individual African states it is clear that these concerns have mainly been

[238] ASP, Report of the Working Group on Amendments, ICC-ASP/13/31, 7 December 2014, para. 9.

[239] The 2015 and 2016 reports only state that 'no further updates were provided by South Africa concerning its proposal during the inter-sessional period'. ASP, Report of the Working Group on Amendments, ICC-ASP/14/34, 16 November 2015, para. 17; ASP, Report of the Working Group on Amendments, ICC-ASP/15/24, 8 November 2016, para. 19.

[240] The AU Assembly recalled its amendment proposal to Articles 16 and 27 in January 2015. Furthermore, the AU Assembly expressed 'its concerns on the failure by the ASP to consider the concerns and proposals for amendments …during the 13th Session of the ASP held in ... December 2014'. See AU Assembly, Decision January 2015, paras. 10-11. See also the statements of Lesotho (on behalf of the African states parties to the ICC), Namibia and Uganda in ASP, General Debate 2014.

[241] With deferral 'regime', I refer to the rules on when or how the Court's proceedings can be suspended.

directed at the Security Council. The AU and its member states asked the Council on numerous occasions to defer the prosecution of al-Bashir and to delay the cases against Kenyatta and Ruto. The Council so far refused to grant any of these requests. It did not take a decision on the proposed deferral for al-Bashir and voted down the deferral bid for Kenyatta and Ruto.

A first reason why the AU's deferral requests failed to obtain support from the Council is that some of the Court's states parties have tried to encapsulate the use of the Council's deferral power. These states have argued that a deferral can only be considered when the continuation of the Court's proceedings poses by itself a threat to the peace in the sense of Article 39 of the Charter, and even then, only when there are absolutely no alternatives to accommodate this threat.

In my opinion, such calls for a 'strict interpretation' of Article 16 are unconvincing in light of the text and drafting history of this provision.[242] Neither the Statute nor the Charter specifies under what kind of circumstances the Council should suspend an investigation or prosecution. There is no legal requirement for the Council to issue a deferral and so the validity of the Council's responses to the AU's deferral requests cannot be contested. Still, the 'legal' arguments that some states have made against the use of Article 16 should be strongly rejected. Most importantly, it should be stressed that the reference in Article 16 to Chapter VII does not limit the Council's deferral power to the extent that the Council can only issue a deferral when an investigation or prosecution poses by itself a threat to the peace. There is no legal basis for such a limitation to the Council's wide discretion to determine that a certain situation constitutes a threat to the peace and to decide on the appropriate measures to address this threat.

A second reason why the AU's deferral requests were opposed by the Council as a whole is that there is no agreement among its members on when or how Article 16 should be employed. The available statements demonstrate that the members of the Council have very different ideas not only on the interpretation but also on the application of this provision, especially when it comes to the kind of circumstances that could justify a deferral. To put it bluntly, perhaps except for a situation in which the US would pressure the Council to adopt a deferral (as in the case of Resolutions 1422 and 1487), no

[242] See the statements of Argentina and Luxembourg in UNSC, S/PV.7060, 15 November 2013.

deferral request may ever succeed to convince a majority of the Council. The views among the permanent and non-permanent members of the Council on how to use Article 16 are so far apart that the Council will not likely be able to agree on any deferral request.

Because of the Council's limited response to the AU's deferral requests, several states and commentators have suggested that other actors within and outside the Court could play a role in mediating the interests of peace and prosecution. Firstly, it has been argued that the Prosecutor may consider to defer an investigation or prosecution in the interests of peace. The Prosecutor would always have this discretion under Article 53 of the Statute. Secondly, the AU has asked for an amendment to Article 16. As introduced by South Africa to the ASP in late 2009, this amendment would give the UN General Assembly the authority to suspend the Court's proceedings when the Council fails to decide on a deferral request within six months of its submission.

Legally speaking, both proposals are defendable. The first proposal is in accordance with the current formulation of Article 53. Based on the text and especially the direct context of the interests of justice element, the most convincing interpretation is that Article 53 gives the Prosecutor a broad discretion to consider all possible circumstances, including the interests of peace. The second proposal requires an amendment to the Statute. This amendment is probably in accordance with the UN Charter and would allow the General Assembly to issue a deferral when the Council is not actively considering the initial deferral request and when this request has been rejected by the Council because of lack of unanimity of the permanent members.

For the time being, however, the Prosecutor and the ASP oppose both proposals for an alternative deferral mechanism. Like her predecessor, Fatou Bensouda has argued that her Office cannot address the demands of peace or any other political considerations. In her view, the interests of justice, as embedded in Article 53, should 'not be confused with the interests of peace and security', which falls within 'the mandate of other institutions, such as the UN Security Council'.[243]

[243] OTP, Key note address Mrs. Fatou Bensouda - International justice and diplomacy partnering for peace and international security, 20 March 2013, p. 3.

In a related fashion, the ASP has long ignored the AU's peace concerns and the proposed amendment to Article 16. Only in November 2013, when the possibility of a mass withdrawal of African states became a serious threat, the ASP decided to organize an interactive dialogue on the matter. Following this special segment, there have been some low-level discussions in the ASP's working group on amendments about the proposed revision of Article 16. Yet, nothing concrete has emerged from these discussions so far. This has led the AU Assembly to express its frustration about the 'failure' of the ASP to debate 'the concerns and proposals for amendments by the AU'.[244]

Taken together, the responses of the Prosecutor and the ASP highlight that under the existing deferral regime of the ICC, the Security Council forms the primary forum to address peace concerns. The Prosecutor (by explicitly saying so) and the ASP (by staying more or less silent on the matter) have outsourced the peace concerns of the AU to the Council. From a strategic point of view, this reluctance of the Prosecutor and the ASP to become involved with deferral politics is understandable. The Prosecutor seeks to legitimize the OTP by depoliticizing its decision-making as much as possible, and the majority of the ASP perceives formal changes to the ICC's deferral regime as inexpedient, because this amounts to a revision of one of the most politically controversial aspects of the Court's legal framework.

Yet, there are, from a legal point of view, good reasons to question the manner in which the Prosecutor and the ASP have responded to the AU's peace concerns. What their responses ultimately foreshadow is that there is no realistic alternative when the Council fails to agree on a deferral request to the Security Council. Intentionally or not, the Council is now not just the primary, but also the only forum that can addresses matters of peace and security in relation to the ICC. This means that there might not be a follow-up to peace concerns when the Council is too divided to make a decision, as happened with the AU's deferral request for al-Bashir, or when the Council rejects a deferral bid, as in the case of Kenyatta and Ruto.

[244] AU Assembly, Decision January 2015, para. 9.

Some will argue that this is for the best, because the Council should not intervene in the Court's proceedings anyway or because the long-term interests of prosecution should always trump the short-term demands of peace. From a legal point of view, however, it is important to emphasize, that the Statute recognizes that there might be situations in which prosecution does not serve the interests of justice (Article 53) or in which the Council has to intervene (Article 16). Cleary, the drafters of the Statute did not agree on the kind of circumstances that could justify a deferral either from the Council or from the Prosecutor, as is illustrated by the open character of the relevant provisions. Yet, they did envision that the Court would have a functioning deferral regime, thereby allowing for a certain level of flexibility and pragmatism in addressing the possible peace concerns of states parties.

In short, the responses of the Council, the Prosecutor and the ASP demonstrate that the Council is *de facto* the only actor with the power to defer an investigation or prosecution in the undefined interests of peace. The Prosecutor has refused to address any political considerations in her decision-making, and the ASP has proven reluctant to debate, let alone adopt, the proposed amendment of Article 16. Furthermore, the responses of the Council to the AU's deferral requests indicate that there is no agreement on the interpretation and application of Article 16, and that it is unlikely that the Council will be able to agree on any deferral request in the foreseeable future. Taking all this into account, the ICC's deferral regime can be qualified as 'dysfunctional'. At this point in time, the interpretation and application of the rules on when or how the Court's proceedings can be suspended are not characterized by flexibility and pragmatism, but by competing views on how the Council, the Court and its states parties should act when some of the Court's audiences perceive prosecution as an obstacle to peace.

Chapter 3

Immunity from Arrest for Sitting Heads of State[1]

One of the most debated questions in international law is whether Heads of State and other state officials can be held responsible for crimes committed in their official capacity.[2] On the one hand, it is well-established that states and their official representatives possess certain immunities from the jurisdiction of other states, including immunity from prosecution and arrest. These 'old' rules of international law are based on notions of state sovereignty and sovereign equality and seek to guarantee, *inter alia*, that states do not use their jurisdiction to interfere with the affairs of other states. On the other hand, states have authorized international courts to prosecute state officials for international crimes. The rules and principles of this relatively 'new' branch of international law are based on demands of human rights and seek to advance, *inter alia*, the rights of victims of gross human rights violations.[3]

In the debate on the criminal responsibility of Heads of State and other state officials, the ICC is generally seen as an example of the second branch of international law. One of the most heralded provisions of the Rome Statute is Article 27, which provides that the official capacity of a person shall not exempt this person from 'criminal responsibility' and that immunities 'shall not bar the Court from exercising its jurisdiction'. The Statute also embeds rules, however, of the first branch of international

[1] The initial version of this chapter was completed in May 2016. I have updated the chapter in August 2017 to include the decision of PTC II on al-Bashir's visit to South Africa. *Al-Bashir* (ICC-02/05-01/09-302), Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017; *Al-Bashir* (ICC-02/05-01/09-302-Anx), Minority Opinion of Judge Marc Perrin de Brichambaut, 6 July 2017.

[2] See generally Hazel Fox and Philippa Webb, *The Law of State Immunity* (Oxford: Oxford University Press, 3d edition, 2013); Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford: Oxford University Press, 2008); Arthur Watts, 'The legal position in international law of Heads of States, Heads of Governments and foreign ministers' (1994) 247 *Recueil des cours* 9-130.

[3] As explained by Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 *American Journal of International Law* 407.

law, which seeks to protect the demands of state sovereignty and sovereign equality. The Statute explicitly recognizes that rules of state and diplomatic immunity can sometimes limit the Court in the exercise of its legal powers. Most notably, Article 98(1) states that the Court 'may not proceed with a request for surrender or assistance' when this requires a state to violate its international obligations to accord state or diplomatic immunities to the officials of other states.[4] Simply put, the ICC's immunity regime is a product of both modern and more traditional rules of international law.

It is on the basis of the 'older' rules that are embedded in the ICC's immunity regime that the AU and individual African states have claimed that President Omar al-Bashir of Sudan enjoys immunity from arrest as sitting Head of State. Following the warrant for his arrest issued by the Pre-Trial Chamber,[5] the AU Assembly decided in July 2009 that its member states should not cooperate with the ICC on the arrest and surrender of al-Bashir.[6] In this decision, the Assembly did not contest that the Court has jurisdiction to prosecute the Sudanese President. Although Sudan is not a party to the Statute, the AU (implicitly) accepted that by referring the situation in Darfur to the Prosecutor the Court has obtained the power to prosecute President al-Bashir.[7] What the AU did challenge, however, is that the Court has the power to oblige its states parties to cooperate with the arrest of al-Bashir. According to the Assembly's decision, the Sudanese President still enjoys immunity from arrest under customary

[4] Some commentators have questioned whether Article 98(1) covers the immunities of sitting Heads of State. This chapter departs from the assumption that the reference in Article 98(1) to 'state immunity or diplomatic immunity of a person' includes the immunities of sitting Heads of State. For further discussion on this issue, see part II(B) in this chapter.

[5] *Al-Bashir* (ICC-02/05-01/09-3), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 3 March 2009. Note that a second warrant was issued against al-Bashir for genocide in July 2010. *Al-Bashir* (ICC-02/05-01/09-94), Second Decision on the Prosecution's Application for a Warrant of Arrest, 12 July 2010.

[6] AU Assembly, Decision on the Meeting of African states parties to the Rome Statute of the International Criminal Court, Assembly/AU/Dec.245(XIII), 1-3 July 2009, para. 10. As discussed in chapter 2, the AU's decision was also a reaction to the refusal of the Security Council to issue a deferral under Article 16 of the Statute.

[7] This was also acknowledged by South Africa and other states parties that welcomed al-Bashir on their territory. As noted in ICC South Africa Decision (2017), para. 69.

international law and Article 98(1) precludes the Court from obliging its states parties to violate his immunity as sitting Head of State.

The AU's claim that al-Bashir possesses immunity from arrest became of particular relevance after 2010, when several African states parties ignored the ICC's warrant for al-Bashir's arrest by welcoming the Sudanese President on their territory.[8] From a legal point of view, these state visits brought attention to 'complex and delicate' questions about the ICC's immunity regime, and especially about the interpretation and application of Article 98(1).[9] When and how can states parties invoke this provision? How should the Court treat the officials of a non-party who are subject to the Court's jurisdiction through a Security Council referral? Are these immunities somehow removed by the Council's referral or can states parties still invoke Article 98(1) to refuse cooperation with the arrest of a sitting Head of State like al-Bashir?

This chapter examines the different responses of the Court's pre-trial chambers to the AU's claim that al-Bashir enjoys immunity from arrest. The decisions of the Court's judges on al-Bashir's numerous visits to African states parties are analysed against the background of the debate among states and commentators on the criminal responsibility of sitting Heads of State under the ICC's immunity regime and international law more generally. In the context of this debate, scholars have voiced very different opinions on whether al-Bashir possesses immunity from arrest.[10] Some commentators have argued that there exists an exception under customary international law for the prosecution by an

[8] Between 2010 and August 2017, al-Bashir visited nine different states parties (Chad, Kenya, Djibouti, Malawi, Nigeria, the DRC, South Africa, Uganda and most recently Jordan). For references, see parts III and IV of this chapter.

[9] As characterized by Manuel J. Ventura, 'Escape from Johannesburg?: Sudanese President al-Bashir Visits South Africa, and the Implicit Removal of Head of State Immunity by the UN Security Council in light of Al-Jedda' (2015) 13 *Journal of International Criminal Justice* 1025.

[10] See generally Dov Jacobs, 'The Frog that Wanted to be an Ox - The ICC's Approach to Immunities and Cooperation', in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), pp. 281-302.

international court,[11] or that the Security Council has somehow removed al-Bashir's immunity.[12] Others, however, have taken the position that Article 98(1) can still form an obstacle to the arrest and surrender of al-Bashir.[13] In light of these competing views, this chapter seeks to assess whether the Court's

[11] This is the position taken by PTC I in the Chad and Malawi decisions (2011). For references, see parts II and III of this chapter. See generally Amnesty International, 'Bringing Power to Justice - Absence of Immunity for Heads of State before the International Criminal Court', 2010, 17-30.

[12] This chapter will explain that there are two different ways to argue that the Security Council has removed al-Bashir's immunity. One approach, which I will call the Statute-based approach, argues that the Security Council's referral has placed Sudan in a similar position as a state party. This first approach was recently adopted by PTC II in the South Africa decision (2017). The second approach, which I will call the Charter-based approach, argues that the Security Council has implicitly waived al-Bashir's immunity by obliging Sudan under the UN Charter to cooperate fully with the Court. This second approach was followed by PTC II in the DRC decision (2014). See generally Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333-352; Dapo Akande, 'ICC Issues Detailed Decision on Bashir's Immunity (…At long Last…) But Gets the Law Wrong', *EJIL Talk*, 15 December 2011; Nerina Boschiero, 'The ICC Judicial Finding on Non-cooperation Against the DRC and No Immunity for al-Bashir Based on UNSC Resolution 1593' (2015) 13 *Journal of International Criminal Justice* 625-653; Liu Daqun, in Morten Bergsmo and Ling Yan (eds.), *State Sovereignty and International Law* (Beijing: Torkel Opsahl Academic EPublisher, 2012), pp. 55-74; Claus Kreβ, 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute', in Bergsmo and Yan, *State Sovereignty and International Law*, pp. 223-265; Sophie Papillon, 'Has the United Nations Security Council Implicitly Removed Al Bashir's Immunity?' (2010) 10 *International Criminal Law Review* 275-288; Ventura, 'Escape from Johannesburg?', 995-1025; Erika de Wet, 'The implications of President Al-Bashir's Visit to South Africa for International and Domestic Law' (2015) 13 *Journal of International Criminal Justice* 1049-1071; Lentner, Gabriel, 'Why the ICC won't get it right - The Legal Nature of UN Security Council Referrals and Al-Bashir Immunities', *EJIL Talk*, 24 July 2017.

[13] See Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7 *Journal of International Criminal Justice* 315-332; André de Hoogh and Abel S. Knottnerus, 'ICC Issues New Decision on al-Bashir's Immunities – But Gets the Law Wrong … Again', *EJIL Talk*, 18 April 2014; Paola Gaeta, 'The ICC Changes Its Mind on the Immunity from Arrest of President Al Bashir, But It Is Wrong Again', *Opinio juris*, 23 April 2014. See also Michiel Blommestijn and Cedric Ryngaert, 'Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al-Bashir - A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity' (2010) 6 *Zeitschrift für Internationale Strafrechtsdogmatik* 428-444; Asad Kiyani, 'Al-Bashir & the ICC: The Problem of Head of State Immunity' (2013) 12 *Chinese Journal of International Law* 467-508.

decisions on al-Bashir's immunity are based on a convincing interpretation of the Court's legal framework and international law more generally.

Parts I and II provide an overview of the existing debate on the immunities of sitting Heads of State before international courts in general, and the ICC in particular. The purpose of this overview is to introduce the different positions in this debate, rather than to explain my own views on how the relevant rules and provisions should be interpreted. Parts III and IV summarize the Court's jurisprudence on the immunity of al-Bashir, and underscore the differences between the Chamber's various decisions. This summary will show that while the Court's pre-trial chambers have consistently argued that the Sudanese President does not enjoy immunity from arrest, their decisions have provided different arguments for why Article 98(1) does not apply in the case of al-Bashir. Part V analyses the reasoning of the Chamber in its most recent decisions on al-Bashir's visits to the DRC and South Africa.[14] The purpose of this analysis is to assess the different approaches that the Court has employed in these decisions and to weigh the different arguments that scholars have advanced in support of the Chamber's approaches. Finally, part VI questions whether the Court's pre-trial chambers have left any ambiguity or uncertainty about the obligation of states parties to arrest al-Bashir, and considers ways for the Court and its states parties to clarify the ICC's rules on immunity in general and the matter of al-Bashir's immunity in particular.

[14] On the decision of PTC II on South Africa's non-cooperation (July 2017), see *inter alia*: Dov Jacobs, 'Does South Africa have an obligation to arrest and surrender Bashir to the ICC? No', *Spreading the Jam*, 14 June 2015; Jens Ohlin, 'More thoughts on al-Bashir, Sudan, and South Africa, *Opinio juris*, 17 June 2015; Asad Kiyani, 'Exploring Legal Rationales for South Africa's Failure to Arrest al-Bashir', *Opinio juris*, 18 June 2015; Dire Tladi, 'The Duty on South Africa to Arrest al-Bashir under South African and International Law: A Perspective from International Law' (2015) 13 *Journal of International Criminal Justice* 1027-1047; Ventura, 'Escape from Johannesburg?', 995-1025; De Wet, 'Implications of Al-Bashir's Visit to South Africa', 1049-1071; Dapo Akande, 'South African Withdrawal from the International Criminal Court - Does the ICC Statute Lead to Violations of Other International Obligations?', *EJIL Talk*, 22 October 2016; Niko Pavlopoulos, 'South Africa's Withdrawal: A Lesson Learned?', *EJIL Talk*, 6 December 2016; Dov Jacobs, 'The ICC and immunities, Round 326: ICC finds that South Africa had an obligation to arrest Bashir but no referral to the UNSC', *Spreading the Jam*, 6 July 2017.

I. Immunities of Sitting Heads of State before International Courts

In recent years, the status of immunities under international law has been at the heart of two judgments of the International Court of Justice (ICJ),[15] and has been one of the main topics that the International Law Commission (ILC) has worked on (since 2007).[16] The ICJ's judgments and the discussions in the ILC have sparked a lot of debate on the scope of both civil and criminal immunities. From this debate, it is clear that much remains contested about the international law of immunities in general, and about the immunities of sitting Heads of State (and Government) in particular.

What most commentators agree upon, however, is that the immunities of sitting Heads of State are closely related to the rules of state immunity. It is well established that the immunities of sitting Heads of State are similar to state immunity, in the sense that they are both based on notions of the sovereign equality of states and that they are designed to assist states in maintaining their horizontal relations with other states.[17] The immunities of sitting Heads of State may be understood as a sub-category of state immunity. The scope of the immunities of sitting Heads of State differs from the scope of state immunity, but the first set of immunities is of necessity part of the second, because the immunities of sitting Heads of State belong to states and not to the person taking up an official position.

[15] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, [2012] ICJ Rep 99; *Arrest Warrant of 11 April 2000 (DRC v. Belgium)*, Judgment, [2002] ICJ Rep 3. Note that the international law of immunities was also addressed in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, [2008] ICJ Rep 422; *Case Concerning United States Diplomatic and Consular Staff in Teheran (United States v. Iran)*, Judgment, [1981] ICJ Rep 1981, p. 45. Further note that the international law of immunities will likely be addressed in two upcoming cases: ICJ, Press Release (No. 2016/38) - Immunities and Criminal Proceedings (Equatorial Guinea v. France), 7 December 2016; ICJ, Press Release (No. 2016/19) - Iran institutes proceedings against the United States with regard to a dispute concerning alleged violations of the 1955 Treaty of Amity, 15 June 2016.

[16] The topic of immunity of state officials from foreign criminal jurisdiction has been on the agenda of the ILC since 2007. For an overview of the ILC's consideration of this topic, see ILC Special Rapporteur Hernández, Fourth report on the immunity of State officials from foreign criminal jurisdiction, A/CN.4/686, 29 May 2015, paras. 1-14.

[17] Akande, 'International Law Immunities and the ICC', 415-416.

It is also widely accepted that the immunities that state officials possess under international law have at least one of three purposes, that is: (A) to prevent states from using their civil and criminal jurisdiction to undermine the public acts of foreign states; (B) to protect individual office holders as representatives of their state; and/or (C) to 'guarantee the proper functioning' of international relations.[18] With respect to these three different purposes, scholars also commonly distinguish personal from functional immunities.

On the one hand, personal immunities (*ratione personae)* are attached to an official position and only apply for the period that a person fulfils that position. This type of immunities can solely be relied upon for incumbent officials, and has (C) the proper functioning of international relations as its primary objective.[19] On the other hand, functional immunities (*ratione materiae*) are attached to official acts, and may be relied upon by both serving and former officials.[20] These immunities are aimed (B) at protecting individual office holders from being held responsible for acts that were essentially those of their state and further have to ensure (A) that states cannot undermine the public acts of foreign states by circumventing the immunities of these states through the prosecution of persons who act(ed) on their behalf.

A. Waiving and removing immunities

Both personal and functional immunities are intended to protect states as well as the individuals through which states act. By their very nature, however, these immunities do not belong to individuals; they

[18] *Arrest Warrant of 11 April 2000 (DRC v. Belgium)*, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, [2002], ICJ Rep 75.

[19] Note that Akande and Shah also refer to 'symbolic sovereignty' and the 'principle of non-intervention' as further justifications for the existence of personal immunities. Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 *European Journal of International Law* 824-825.

[20] See Van Alebeek, 'The Immunity of States and Their Officials', p. 2.

belong to states. It is because of the state that an act or position becomes 'official'. What follows from this legal ontology is that under international law a state possesses the authority to waive immunities.[21]

Theoretically speaking, a state can waive immunities in at least two ways. First of all, a state can voluntarily waive immunities on 'a case-by-case basis'. A state can, for example, waive the immunities of a specific individual official to enable his or her prosecution by an international or a foreign domestic court. Alternatively, waivers can be given on a 'permanent basis'. A state can reach an agreement which waives the immunities of its officials when they commit particular crimes. Article 27 of the Statute has, for example, be interpreted as a permanent waiver by which states have derogated from the international law of immunities. This provision recognizes that immunities attached to the official capacity of a person under international or domestic law will not bar the ICC from exercising its jurisdiction over that person.[22]

Apart from having the authority to voluntarily waive immunities, a state may be subject to an obligation to waive certain immunities under international law and, in exceptional situations, immunities may even be removed by an international organisation. Three scenarios must be distinguished. First of all, a state may have a *'legal obligation to waive its immunities'* (an obliged waiver). This is the case when there is a treaty provision or a rule of customary international law to that effect,[23] or if an

[21] As Special Rapporteur Kolodkin stated, 'immunity does not belong to the individual official but to the official's state. Consequently, only the state can legally invoke the immunity of its officials. The same logic applies to the waiver of immunity'. ILC Special Rapporteur Kolodkin, Third report on immunity of state officials from foreign criminal jurisdiction, A/CN.4/646, 24 May 2011, para. 33.

[22] For references, see part II(A) of this chapter. It has also been argued that the Genocide Convention provides a permanent waiver of immunity for the prosecution of genocide charges. See Minority Opinion of Judge de Brichambaut, paras. 20-37.

[23] For example, Article 4 (section 14) of the Convention on the Privileges and Immunities of the United Nations states that 'Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member not only has the right but is *under a duty to waive* the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the

international organisation has the authority to oblige a state to waive these immunities.[24] Second of all, an international organisation may have the power to actually waive the immunities of a state. This second situation can be described as a '*removal of immunities'* (sometimes also called an imposed waiver). It is the international organisation that removes the immunities instead of the state itself. Finally, the rules on immunities under customary international law may develop in a new direction, leading to a '*disappearance of immunities'*. Theoretically speaking, immunities that exist today can disappear in the future, in the sense that they have no longer any legal relevance. Developments in state practice and *opinio juris* may change the scope of existing immunities or even their legal ontology, which may in turn also have implications for the different ways in which the relevant immunities can be waived or removed.[25]

B. The ICJ's obiter dictum in the Arrest Warrant Case

This study focusses on the prosecution and trial of sitting Heads of State by the ICC, and as such on prosecution by an international court rather than a domestic one. Nonetheless, it should be noted that existing jurisprudence has hardly ever disputed that sitting Heads of State are entitled to personal immunities before the courts of foreign states.[26] These immunities apply regardless of whether a Head of State is accused of international crimes. As the ICJ ruled in the Arrest Warrant case, the (personal) immunities of sitting Heads of State and certain other high-level officials cover all their official and private acts.[27] Moreover, these immunities are not only violated if a foreign state arrests the concerned

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purpose for which the immunity is accorded' (emphasis added). The Convention on the Privileges and Immunities of the United Nations, 13 February 1946, UN Treaty Series, Volume 1, p. 15.

[24] For example, it has been argued that the UN Security Council is in certain situations authorized to obliged states to waive immunities. For further discussion on this matter, see part V(B) in this chapter.

[25] This chapter applies the terminology of the waiver, removal and disappearance of immunities as consistently as possible. It should be noted, however, that in the literature and the relevant judicial decisions, these terms are sometimes used in a different manner.

[26] For a brief overview of the relevant jurisprudence, see Akande and Shah, 'Immunities of State Officials', 819-820. See generally Van Alebeek, 'The Immunity of States and Their Officials', pp. 159-199.

[27] DRC v. Belgium, paras. 55, 70-71.

officials, but also if a state issues and circulates a warrant of arrest or takes any other action 'that would hinder [them] in the performance of [their] duties'.[28] The scope of the personal immunities of Heads of State before foreign courts is thus effectively considered to be absolute.[29]

The reason why it is important to point this out, even though this study is not concerned with domestic prosecution, is that the same cannot be said about the prosecution of sitting Heads of State by an international court. Indeed, the 'availability of immunity as a shield [is] more limited before an international court'.[30] In its *obiter dictum* in the Arrest Warrant case, the ICJ acknowledged as much when it stated that 'in certain circumstances' the immunities of sitting Heads of State and other state officials 'do not represent a bar to criminal jurisdiction' and referred in support to 'certain international criminal courts, where they have jurisdiction'.[31] In this part of the ruling, the ICJ indicated that in contrast to their domestic counterparts, certain international courts are, at least 'in certain circumstances', authorized to prosecute sitting Heads of State.

However, the difficulty with the ICJ's *obiter dictum* is that it can be interpreted in very different ways. The most progressive view is that the ICJ's *obiter dictum* points to an exception under customary international law and that the immunities of Heads of State and other high-level officials are completely irrelevant before an international court like the ICC.[32] Yet, there are reasons to question whether this is how the ICJ's ruling should be understood.[33]

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[28] *Ibid.* para. 54. See also Djibouti v. France, para. 170.

[29] The scope of functional immunities for international crimes before national courts is less clear. See generally Van Alebeek, 'The Immunity of States and Their Officials', pp. 103-157.

[30] As quoted from: *Arrest Warrant of 11 April 2000 (DRC v. Belgium)*, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, [2002], ICJ Rep 75.

[31] DRC v. Belgium, para. 61. See generally Van Alebeek, 'The Immunity of States and Their Officials', pp. 158-199.

[32] This is the position taken by PTC I in the Chad and Malawi decisions. For further references, see part III in this chapter.

[33] In the literature on the case against al-Bashir, see for example Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', 318-319; Jacobs, 'The ICC's Approach to Immunities and Cooperation', pp. 287-289; Kreβ, 'The ICC and Immunities', pp. 244-245.

First of all, the ICJ did not explain why immunities do not represent a bar to the jurisdiction of certain international courts. Did the ICJ hint at an exception under customary international law, or did it simply observe that some states have granted a permanent waiver for their immunities to certain courts? The ruling itself does not give a conclusive answer.[34]

Second of all, the ICJ did not explain whether immunities are completely irrelevant for the international courts concerned. If immunities do not represent a bar to the exercise of jurisdiction by a specific court, this does not necessarily mean that states do not commit an internationally wrongful act against another state when they arrest its sitting Head of State on behalf of this court. Apart from a substantive defence, immunities can pose a procedural bar to the exercise of jurisdiction by an international court (at a vertical level) or to the cooperation of states with such a court in relation to another state (at a horizontal level).[35] By failing to distinguish the different ways in which immunities can form an obstacle to the effective prosecution by an international court, the Arrest Warrant case left it unclear what the scope of the alleged exception under customary international law is.

Despite the lack of clarity in the Arrest Warrant case, the Special Court for Sierra Leone (Special Court) has referred to the ICJ's *obiter dictum* in concluding that there exists an exception under customary international law for the prosecution of sitting Heads of State by an international court. In this decision from 2004, concerning the immunities of former Liberian President Charles Taylor, the Appeals Chamber of the Special Court stated that 'the principle seems now well established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court'.[36] Like the ICJ's *obiter dictum,* this decision has sparked a lot

[34] The decision itself is silent on this point, but it can be noted that the ICJ explicitly referred to Article 27(2) of the Rome Statute, but did not consider state practice and *opinio juris* for a possible exception under customary international law.

[35] See, for example, Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', 319.

[36] *The Prosecutor v. Charles Ghankay Taylor* (SCSL-2003-01-I-Ar72(E)), Decision on Immunity from Jurisdiction, 31 May 2004, paras 51-52. See generally Sarah M. H. Nouwen, 'The Special Court for Sierra Leone and the Immunity of Taylor: The Arrest Warrant Case Continued' (2005) 18 *Leiden Journal of International Law* 645-669.

of debate, in which some commentators have supported the conclusion of the Special Court, but many others have questioned its underlying reasoning.[37]

Regardless of one's views on the scope of immunities of sitting Heads of State under customary international law, it is important to stress that an analysis of the (ir)relevance of immunities before a specific international court can never suffice with a discussion on the status of customary international law. At least two qualifications should be made to the alleged principle that immunity as a product of sovereignty cannot prevent prosecution before an international court.

Firstly, much depends on the statute of the relevant court. In a general sense, it cannot be ruled out that two or more states establish a court which precludes the prosecution of sitting Heads of State. Under international law, there is no reason why states cannot include such a limitation into the legal mandate of a court.[38]

Secondly, a treaty establishing a court like the ICC cannot, in principle, 'create either rights or obligations for a third state without its consent' (the *pacta tertiis* rule), as is stipulated in Article 34 of

[37] See part IV(C) in this chapter.

[38] In fact, this is exactly what the recently adopted Amendment Protocol on the Criminal Chamber of the African Court does by giving sitting Heads of State and certain other high-level officials immunity from prosecution during their term(s) in office. On Article 46Abis of the Amendment Protocol, see Abel S. Knottnerus and Eefje de Volder, 'International Criminal Justice and the early formation of an African Criminal Court', in Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (eds.), *Africa and the ICC: Perceptions of Justice* (Cambridge: Cambridge University Press, 2016), pp. 386-387; Dire Tladi, 'The Immunity Provision in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff' (2015) 13 *Journal of International Criminal Justice* 3-17. See also *SS 'Wimbledon' (United Kingdom and ors v Germany)*, Judgment, [1923] PCIJ Series A no 1, ICGJ 235, para. 35 (arguing that 'the Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty').

the Vienna Convention on the Law of Treaties (VCLT).[39] Obligations for a state not bound to a treaty can only be created by the third state itself, by an authorized international organization, or by a rule of customary international law. This means that the rights and obligations with respect to the immunities of sitting Heads of State may be different for the members of a court than for states that are not.

In short, even if one were to assume that there exists an exception under customary international law (as argued by the Special Court), one has to consider the rules of the specific court before coming to any conclusions about the (ir)relevance of immunities of sitting Heads of State before this court. With this in mind, the following part turns to the legal framework of the ICC and provides an overview of the relevant provisions of the Rome Statute.

II. Immunities of Sitting Heads of State before the ICC

For the ICC, Article 21 of the Statute makes clear that the Court has to rule on the basis of its Statute, and can only turn to customary international law, when there is a *lacuna* in the internal law of the Court itself which cannot be filled by the application of Articles 31 and 32 of the VCLT.[40] This means that the relevant provisions of the Statute, rather than the existing rules of state and diplomatic immunity are the starting point for answering questions about the (ir)relevance of immunities before the ICC.

The first provision in the Statute relevant to the immunities of sitting Heads of State is Article 27(1), which states that:

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a Government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

[39] Article 34 of the Vienna Convention states that 'a treaty does not create either obligations or rights for a third State without its consent'.

[40] As discussed in chapter 1, part I(B).

This provision is included in Part III of Statute on general principles of criminal law and makes clear that neither functional nor personal immunities can relieve a person from individual criminal responsibility before the ICC.[41] Under the Rome Statute, a plea of official capacity by state officials is not accepted as a substantive defence.

However, the irrelevance of immunities on a substantive level does not necessarily mean that immunities cannot pose a bar to the application of the powers of an international court at a procedural level. Immunities could still form a procedural bar (A) to the exercise of the jurisdiction by an international court or (B) to the cooperation of states with that court.

A. Immunities as a procedural bar to the exercise of the Court's jurisdiction

The first way in which immunities can pose a procedural obstacle to the proceedings of an international court like the ICC is as a bar to the exercise of its jurisdiction. Immunities may in certain circumstances limit the investigatory and prosecutorial powers of an international court, including its power to issue and circulate arrest warrants.

With respect to the jurisdiction of the ICC, the second paragraph of Article 27 provides that:

[41] Similar provisions were included in the agreements for the Nuremberg and Tokyo Tribunals, as well as the Statutes of the ICTY and the ICTR. It may be argued that Article 27(1) and similar provisions in previous agreements do not concern immunity at all, 'since a statement that a person may be legally responsible does not address whether that person is subject to the jurisdiction of a particular forum, that is, whether that forum may determine that responsibility'. However, 'questions of legal responsibility are not wholly separate from questions of immunity'. Regardless of any implications for the Court's jurisdiction, Article 27(1) does have the effect of making immunities irrelevant on a substantive level, because sitting or former state officials will not be able to invoke immunities to justify their certain actions under this provision. For a more detailed discussion on the interpretation of Article 27(1), see Akande, 'International Law Immunities and the ICC', 419-420; William Schabas, *A Commentary on The Rome Statute* (Oxford: Oxford University Press, 2010), pp. 447-449; Otto Triffterer, 'Article 27 - Irrelevance of official capacity', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Oxford: Hart Publishing, 2008, 2nd edition), pp. 779-794.

> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

This provision seems to be quite clear in stating that 'immunities … shall not bar the Court from the exercise of jurisdiction'. This formulation leaves no doubt that the Court is able to investigate and prosecute the sitting Heads of State of all states that have ratified the Rome Statute. A more complicated question, however, is whether the Court can also exercise its jurisdiction with respect to the sitting Head of State of a state that has not ratified the Statute (a non-party), like Sudan, Russia or the United States.

In addressing this question, some commentators have argued that Article 27(2) 'simply restates an already existing principle concerning the application of jurisdiction by *any* international criminal court'.[42] According to Paola Gaeta, it is firmly established that an international court, like the ICC, is permitted to issue an arrest warrant against a representative of a non-party, regardless of the immunities that this person would normally enjoy from prosecution before a foreign domestic court. While a non-party is not bound to the Statute, as stipulated by Article 34 of the VCLT, this state would still be bound by this principle of customary international law.[43] The immunities of non-parties would therefore not pose any limits whatsoever to the exercise of the Court's jurisdiction. Whenever the Court's jurisdiction is triggered the Court would be able to prosecute the sitting Head of State of an involved non-party.

Other commentators, however, have taken a different position on this question. In contrast to the idea that Article 27(2) reflects a principle of customary international law, Dapo Akande has argued that Article 27(2) is 'new' in the sense that it 'constitutes a waiver by states parties of any immunity that their officials would otherwise possess vis-à-vis the ICC'.[44] If he is right, then the question whether the Court is able to exercise jurisdiction over the sitting Head of State of a non-party is a tricky one. In the

[42] Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', 322. See also Tladi, 'Duty South Africa to Arrest al-Bashir' 1034-1035.

[43] For a response to Gaeta's claim that Article 27(2) reflects customary international law, in relation to the Chad and Malawi decisions of the PTC, see Jacobs, 'The ICC's Approach to Immunities and Cooperation', pp. 286-289.

[44] Akande, 'International Law Immunities and the ICC', 402.

literature, two approaches have been considered in this regard. The first approach argues that the Court's judges are required to apply Article 27(2) and have to ignore any immunities that would otherwise pose a procedural bar to the exercise of the Court's jurisdiction (*i.e.,* direct application).[45] The second approach distinguishes between the three different ways in which the Court can obtain jurisdiction *ratione materiae* over nationals of a non-party (*i.e.,* differentiated application).

In advancing the first approach, Dov Jacobs has argued that since the Court's judges are tasked with applying the Statute and because Article 27(2) does not distinguish between states parties and non-parties, the judges are 'statutorily bound ... to ignore any immunity that might be an obstacle to the exercise of jurisdiction'.[46] While acknowledging that this could lead the ICC, as an international organisation, to commit an internationally wrongful act against a non-party by violating rules of state and diplomatic immunity, Jacobs has claimed that 'it is certainly not the judges' function to address [that] problem'.[47] Their task would be to act as 'the 'domestic judges of the Statute' and to apply the Statute in accordance with Article 21.[48]

The second approach does not depart from the idea that Article 27(2) should be applied directly, but looks at the different ways in which the Court can obtain jurisdiction over the nationals of a non-party like Sudan.[49] Under the Statute, this can happen in three different ways: (A) a non-party can issue a declaration under Article 12(3); (B) the Court can obtain jurisdiction because international crimes have allegedly been committed by nationals of a non-party on the territory of a state party in accordance with Article 12(2)(a); or (C) the Security Council can refer a situation involving nationals of a non-party to the Prosecutor under Article 13(b) and thereby trigger the Court's jurisdiction. According to the second

[45] Jacobs, 'The ICC's Approach to Immunities and Cooperation', pp. 291-292.

[46] Jacobs further added in this regard that 'Article 27 is not technically addressed at states'. Jacobs, 'The ICC's Approach to Immunities and Cooperation', p. 292.

[47] *Ibid.*

[48] *Ibid.,* p. 291.

[49] Implicitly, this approach departs from the assumption that the Court should not violate customary international law, and that the Court should accommodate the *pacta tertiis* rule of Article 34 of the VCLT.

approach, each of these three ways in which the Court can obtain jurisdiction over the nationals of a non-party affects the immunities of the respective non-party in a different manner.

In the first situation, immunities do not pose any limits to the exercise of the Court's jurisdiction over the nationals of the non-party that issued a declaration under Article 12(3). As stated in Article 12(3), the respective non-party accepts 'the exercise of jurisdiction by the Court with respect to the crime in question'. This means that by adopting a declaration under Article 12(3), a non-party voluntarily waives the immunities of its officials in relation to the crimes over which it gives the Court jurisdiction.[50]

In the second situation, however, immunities might continue to pose a procedural bar to the exercise of the Court's jurisdiction. According to the differentiated approach, if Article 27(2) does not reflect customary international law, the Court is not able to prosecute the sitting Head of State of a non-party under Article 12(2)(a) without violating customary international law. Theoretically speaking, the ICC could therefore not indict the Russian President for the alleged commission of international crimes in one of the Court's members (such as Georgia) or issue an arrest warrant against the Israeli Prime Minister for unlawful settlements on Palestinian territory, because Russia and Israel are not a party to the Statute.

The third situation that can be distinguished is the most difficult one. The implications of a Security Council referral for the immunities of the sitting Head of State of a non-party have been the topic of considerable debate, especially in relation to the prosecution of al-Bashir. If the Council refers a situation to the Court in accordance with Article 13(b), like the situation in Darfur, does this affect the immunities of non-parties?

From the literature, it is clear that there are different views on what could be the implications of a Security Council referral.[51] One view is that a referral places a non-party in a position that is similar

[50] Note that a declaration under Article 12(3) does not affect the immunities of other non-parties that might be involved with the referred situation.

[51] For references, see part V of this chapter.

to that of a state party. Akande has, for example, argued that a Security Council referral binds a non-party 'indirectly' to (all) the provisions of the Statute, including Article 27(2).[52] Another view is that the Council implicitly removes the immunities of a non-party, when it obliges that state to cooperate fully with the Court.[53] What these two variants of the 'Security Council avenue' share is that the question whether the Court is able to prosecute the sitting Head of State of a non-party should not be answered in a general fashion, but in reference to the Security Council's referral as being the specific way in which the Court has obtained jurisdiction over the nationals of a non-party.[54] A final view, is that a Security Council referral does not affect the immunities of non-parties at all. The Security Council may oblige a state to waive certain immunities and may perhaps even remove immunities on its behalf, but on this alternative view, such actions are separate from Article 13(b) and only create obligations under the Charter, and not under the Statute.[55]

B. Immunities as a procedural bar to cooperation with the Court

If the immunities of sitting Heads of State do not form a substantive defence and do not somehow disable the exercise of the Court's jurisdiction, there is still one other way in which immunities can block the Court's proceedings. When the Court is permitted to prosecute a sitting Head of State, personal immunities may in certain situations preclude the Court from requesting states parties to arrest and surrender this Head of State.

In general, a distinction can be drawn between the 'vertical' and 'horizontal level' on which immunities apply. Immunities exist on a vertical level, that is, between an international court and states, to the extent that states can invoke immunities to oppose the prosecution of their officials. The legal power of a court to issue an arrest warrant does not imply, however, that immunities are also irrelevant

[52] Akande, 'The Legal Nature of Security Council Referrals', 340-341. A similar approach was recently adopted by PTC II in the South Africa decision (2017), para. 88. For further discussion and references, see part V(A) and V(C) of this chapter.

[53] De Wet, 'Implications of Al-Bashir's Visit to South Africa', 1057-1063. A similar approach was adopted by PTC II in the DRC decision, para. 29. For further discussion and references, see part V(B) of this chapter.

[54] Kreβ, 'ICC and Immunities', p. 241.

[55] For further discussion and references, see part V(B) and V(C) of this chapter.

on a horizontal level, that is, by state A vis-à-vis state B. By arresting an official of state B *(i.e.*, Sudan) on behalf of an international court, state A (*i.e.*, Malawi, the DRC or South Africa) may still violate the immunities of state B, even when the court itself has acted within its powers by issuing an arrest warrant for the concerned official.

In the Rome Statute, Article 27(2) addresses the application of immunities on a vertical level, whereas Article 98(1) regulates the functioning of immunities on a horizontal level. This second provision foreshadows that immunities can preclude the Court from obliging states parties to arrest certain persons, even if the Court has jurisdiction to prosecute them. It provides that:

> 1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

This provision places a procedural duty on the Court to examine whether a request for surrender or assistance would require a state to violate certain specific obligations under international law. The Court has to check this for every specific cooperation request (so not for the whole case at once),[56] and if the Court finds that cooperation with a certain request may indeed result in a violation of 'the state or diplomatic immunity of a person or property of a third state', the Court cannot proceed with this request, unless it has first obtained 'the cooperation of that third state for the waiver of the immunity'.

It is important to note that while Article 98(1) puts a procedural duty on the Court, this provision does not allow states parties to ignore a cooperation request whenever they feel that this request forces them to violate other obligations under international law.[57] Article 97 and Rule 195(1) of the Rules of

[56] This follows from the wording of the provision, which speaks of 'a request' and 'the requested state' in singular and not in broader terms about a general request to all states parties.

[57] See, for example, Claus Kreβ and Kimberly Prost, 'Article 97 - Consultations', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Oxford: Hart Publishing, 2008, 2nd edition), pp. 1599-1600. See also ICC South Africa decision (2017), paras. 104-106.

Procedure and Evidence (RPE) make clear that this is a decision for the Court's judges to make rather than for the states parties themselves. First of all, Article 97 requires the Court's states parties 'to consult with the Court without delay', if they identify a problem which may impede or prevent the execution of a cooperation request.[58] Second of all, and more to the point, Rule 195(1) stipulates that:

> 1. When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court.

Together with Article 97, Rule 195(1) determines that a state party which believes that Article 98(1) applies, has to inform the Court about this. Eventually, it will not be the state party, but the Court that decides whether Article 98(1) relieves a state party from its obligation under Article 89(1) to cooperate with a request for the arrest of a person.[59]

Article 97 and Rule 195(1) signal a 'cooperative approach' to the resolution of problems of execution and presume 'good faith efforts on the parts of the Court and the State'.[60] Yet, when consultations do not lead to a solution, the Court can rely on its authority under Article 87(7) and Article

[58] Article 97 of the Rome Statute states that 'where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, *inter alia*: (a) Insufficient information to execute the request; (b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or (c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State'.

[59] Article 89(1) of the Rome Statute states that 'the Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender'.

[60] Kreβ and Prost, 'Article 97', p. 1599.

119(1) to settle whether Article 98(1) applies.[61] As the Prosecutor rightly stated in relation to the case against President al-Bashir: 'reasonable minds, reasonable lawyers may differ in their interpretation of the Statute. However, what is clear and indisputable is which body determines with authority and finality the issue of whether or not immunity is attached to the individual in question in any specific case, and that is the Court and only the Court'.[62]

The real difficulty with Article 98(1), however, is its substantive scope.[63] A first question that has attracted debate is whether the reference to 'third state' in Article 98(1) means any other state than

[61] Article 87(7) of the Rome Statute states that 'where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council'. Article 119(1) of the Rome Statute provides that 'any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court'.

[62] Statement of the Prosecutor UNSC, S/PV.7710, 9 June 2016. The Prosecutor further added that 'if a State chooses to join the Court and becomes a State party, then it is bound to accept and follow the provisions of the Rome Statute as they apply to States parties; this includes being bound by the decisions of the Court. So who decides the issue of the apparent tension between articles 27, on the irrelevance of official capacity, and article 98(1), on cooperation with respect to waiver of immunity and consent to surrender? The answer is clear: it is not the States parties themselves; it is not the Security Council; it is not academics; it is the Court itself. … The Court is the only and sole authority to decide whether or not the immunity is generally attached to Mr. Al-Bashir, as sitting Head of State, where applicable in this particular case. The conclusion finds support in article 119(1) of the Statute, which provides that any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court. This is a decision of the Court; therefore, simply put, it is binding on States parties that have joined the Court'.

[63] Do note, however, that the consultation procedure under Article 97 has recently proven to have controversial elements as well. South Africa argued during the yearly meeting of the ASP in 2015 that there is no clear procedure regarding the structuring of the consultations under Article 97. ASP, List of supplementary items requested for inclusion in the agenda of the fourteenth session of the Assembly, ICC-ASP/14/35, 27 October 2015. Following the plenary debate on the supplementary agenda item introduced by South Africa, the ASP expressed its willingness to consider, within the framework of the appropriate subsidiary body of the Assembly, proposals to develop procedures for the implementation of Article 97. For this purpose, the Bureau established a working group on the implementation of Article 97, which presented its first (explorative) rapport in late 2016: ASP, Report of the Chair of the working group of the Bureau on the implementation of Article 97 of the Rome Statute of the International Criminal Court, ICC-ASP/15/35, 24 November 2016. See also the statements of Canada, Ghana, Portugal, South

the requested state, including other states parties, or whether it only covers non-parties? According to most commentators, Article 98(1) can, at least with respect to the immunities of state officials, only benefit non-parties.[64] In support of this view, it has been argued that if Article 98(1) would allow states parties to rely on immunities in order to prevent the arrest of their officials, this would pose 'an insurmountable obstacle' to the prosecution of state officials, which would 'clearly be incompatible with the object and purpose of Article 27(2)'.[65] Based on this argument, most commentators have accepted that Article 27(2) does not only waive immunities for the exercise of jurisdiction by the Court, but also for actions taken by states parties upon request of the Court.[66] Consequently, it is assumed that Article

Africa and Uganda in ASP, General Debate of the Fifteenth Session, 16-17 November 2016. South Africa also expressed its concerns about Article 97 to the PTC. In its decision on the non-cooperation of South Africa (2017), the Chamber included a detailed discussion on this matter and more generally about the rationale of Article 97 (paras. 110-121). For further discussion and references, see part III(C) in this chapter.

[64] Akande, 'International Law Immunities and the ICC', 422-424; Akande, 'The Legal Nature of Security Council Referrals', 337-339. See also Schabas, 'Commentary', pp. 1040-1041; Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', 328; Paola Gaeta, 'Official Capacity and Immunities', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), pp. 993-994; Manisuli Ssenyonjo, 'The Rise of the African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders' (2013) 13 *International Criminal Law Review* 407; De Wet, 'Implications of Al-Bashir's Visit to South Africa', 1055-1056. See also ICC DRC decision, para. 27; ICC South Africa decision (2017), paras. 71-83; Minority Opinion of Judge de Brichambaut, paras. 41-47.

[65] As stated in ICC South Africa decision, para. 75. Note that the Chamber also made a textual argument and claimed that 'the general exclusionary clause of Article 27(2)' encompasses 'in its plain meaning' immunity from arrest. According to the Chamber 'had the drafters of the Statute intended exclusion only of a narrow category of immunities, they would have expressed it in plain language'. The language used in Article 27(2) would convey 'comprehensiveness' and would not be 'compatible with the proposition that the immunity from arrest of Heads of State is excluded from it' (para. 74).

[66] The interpretation of the reference to third state in Article 98(1) as a non-party, at least for the purposes of the immunities of state officials, may also be supported by the doctrine of 'effet utile', according to which a provision must be interpreted in such a manner that it has practical effect. As argued by Judge de Brichambaut, 'if the reference to "third state" … referred to another state party, this provision would lose its meaning, in light of the obligations of states parties under Article 27(2) and 86 of the Statute. An interpretation of "third state" as referring to a non-state party to the Statute is therefore the sole interpretation that ensures that effect is given to Article 98(1)' (para. 45).

98(1) does not pose a procedural bar when the Court requests a state party to arrest its own sitting Head of State or the sitting Head of State of another state party.[67]

A second question that has been raised about the substantive scope of Article 98(1) is whether the reference to 'state and diplomatic immunity' covers the immunities of sitting Heads of State. Some commentators, such as Dire Tladi and Jens Iverson, have suggested that Article 98(1) was drafted with the intention to protect diplomatic missions only, and that the reference to state immunity in this provision cannot be interpreted as covering the immunities of sitting Heads of State.[68] In their opinion, states parties are therefore not able to invoke Article 98(1) to oppose the demanded arrest of the sitting Head of State of a non-party.

However, the prevailing view among commentators is that this interpretation of Article 98(1) is too restrictive. As explained by Akande and others, the scope of the immunities of sitting Heads of State may differ from the scope of state immunity, but the first set of immunities is by necessity part of the second.[69] The immunities of sitting Heads of State belong to states and not to the persons who fulfil this official capacity. They are created for the benefit of states and aim to guarantee the proper functioning of international relations. Consequently, it makes sense to assume that by referring to state immunity,

[67] It should be stressed, however, that this interpretation does not necessarily imply that Article 98(1) is strictly confined to non-parties. If Article 27(2) waives the immunities of the sitting Heads of State and other officials of states parties, it does not waive other immunities that are covered by Article 98(1), in particular the immunities of the diplomatic premises of states parties. Notably, Article 98(1) refers not only to the 'immunity of a person', but also to the 'property of a third State'. Since Article 27(2) leaves these immunities in place, the reference to third state in Article 98(1) probably concerns states parties as well. See Kreβ, Claus, and Kimberly Prost, 'Article 98 - Cooperation with respect to waiver of immunity and consent to surrender', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Oxford: Hart Publishing, 2008, 2nd edition), p. 1606; Kreβ, 'The ICC and Immunities', p. 238. Note that this issue is not addressed in the Chamber's decisions on al-Bashir's visits to African states parties.

[68] Tladi, 'The ICC Decisions on Chad and Malawi', 215-216; Iverson, 'Continuing Functions Article 98', 144-145.

[69] Dapo Akande, 'Head of State Immunity is Part of State Immunity: A Response to Jens Iverson', *EJIL Talk*, 27 February 2012. See also Kreβ, 'The ICC and Immunities', pp. 236-238.

Article 98(1) includes the immunities of sitting Heads of State, and not only the immunities of diplomatic missions.

Finally, the last and definitely the most controversial question about the substantive scope of Article 98(1) is how immunities that apply on a horizontal level can be waived or removed so that they do not pose a procedural bar to cooperation with the Court? This question is discussed extensively in parts IV and V with respect to the immunity of al-Bashir. At this point it suffices to note that there are, theoretically speaking, at least three ways in which immunities can stop to apply on a horizontal level. First of all, the relevant immunities can be waived by the concerned state itself. Apart from ratifying the Statute, a state can do this by accepting the Court's jurisdiction under Article 12(3), by issuing an *ad hoc* waiver for a specific case (*i.e.*, waiving the immunity of a state official for the purpose of a specific case) or by ratifying another treaty that incorporates a permanent waiver of immunities.[70] Second of all, these immunities may no longer apply because an exception has developed under customary international law for the prosecution by an international court like the ICC.[71] Lastly, immunities may be removed through a decision of the Security Council or by another competent international organization. In the opinion of some commentators, the Council could remove immunities and deactivate Article 98(1) by obligating a non-party to fully cooperate with the Court,[72] or by binding that state to the Statute.[73]

[70] Some commentators have argued that the Genocide Convention (which Sudan has ratified) includes such a waiver. See generally Akande, 'The Legal Nature of Security Council Referrals', 348-351; Jacobs, 'The ICC's Approach to Immunities and Cooperation', pp. 296-299; Matthew Gillet, 'The Call of Justice: Obligations Under the Genocide Convention to Cooperate with the International Criminal Court' (2012) 23 *Criminal Law Forum* 63-96; Göran Sluiter, 'Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case' (2010) 8 *Journal of International Criminal Justice* 365-382. See also ICC South Africa decision (2017), para. 109; Minority Opinion of Judge de Brichambaut, paras. 4-38.

[71] This is the position taken by PTC I in the Chad and Malawi decisions. The implication of an exception on a horizontal level is that all states, including non-parties, have a right to arrest persons who are prosecuted by the Court. See generally Akande: 'The Legal Nature of Security Council Referrals', 344-348.

[72] This is the position taken by PTC II in the DRC decision (2014).

[73] This is the position taken by PTC II in the South Africa decision (2017).

In sum, there are many competing views among commentators about whether sitting Heads of State enjoy immunities before the ICC. Article 27(1) makes clear that immunities do not relieve a person from criminal responsibility before the ICC. However, the fact that official capacity will not be accepted as a substantive defence does not imply that immunities cannot pose a procedural bar to the exercise of the Court's jurisdiction (on a vertical level) or to the cooperation of states with the arrest of the individuals concerned (on a horizontal level). A combined reading of Articles 27(2) and 98(1) signals that there are important differences between the sitting Heads of State of states parties and of non-parties. Yet, what these differences precisely entail, and what their implications are for the rights and obligations of states parties and non-parties is subject to different opinions as to the interpretation of the relevant provisions of the Statute. These competing views are at the heart of the AU's claim that al-Bashir enjoys immunity from arrest. With all of the above in mind, the following sections turn to the decisions taken by the Court on this particular matter.

III. The Initial Response of Pre-Trial Chamber I

In July 2009, the AU Assembly decided that its member states should not cooperate with the demanded arrest of President al-Bashir.[74] In support, the assembled African leaders referred to Article 98(1). This decision forms the starting point for the ongoing debate about al-Bashir's immunity. It followed upon the warrant that PTC I issued for al-Bashir in March 2009. In this ruling, the Court's judges briefly touched on the implications of al-Bashir's status as sitting Head of State of a non-party.[75] Unfortunately,

[74] AU Assembly, Decision July 2009, para. 10.

[75] ICC First Arrest Warrant al-Bashir, paras. 41-45. Note that the implications of al-Bashir's official status were not addressed in the decision on his second arrest warrant. In the decision on the warrant for Muammar Gaddafi, the second - and to date the only other - sitting Head of State to be prosecuted by the Court, the PTC only recalled its conclusion on the immunity of al-Bashir. *Muammar Gaddafi* (ICC-01/11-12), Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI", 27 June 2011, para. 9.

however, the Chamber did not address any of the questions that the Assembly's decision was about to raise as to the interpretation and application of Article 98(1).

A. Ruling on the arrest warrant for al-Bashir (2009)

On the question whether al-Bashir's immunity could pose a procedural bar to the exercise of the Court's jurisdiction, Presiding Judge Kuenyehia and Judges Usacka and Steiner concluded in their ruling on the first arrest warrant for al-Bashir that 'the current position' of al-Bashir as Head of State 'has no effect on the Court's jurisdiction over the present case'.[76] The Chamber reached this conclusion on the basis of four considerations:

> (A) Firstly, it noted that according to the *Preamble of the Statute*, one of the core goals of the Statute is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole.
>
> (B) Secondly, it quoted *Article 27(1) and (2)* as providing a number of 'core principles' to achieve this goal, including that immunities attached to the official capacity of a person 'shall not bar the Court from exercising its jurisdiction over such a person'.
>
> (C) Thirdly, it recalled that under *Article 21* the Court can only resort to other sources of law when there is a *lacuna* in the written law of the Court and when such a *lacuna* cannot be filled by the application of the general rule of interpretation and Article 21(3) of the Statute.
>
> (D) And finally, it highlighted that by referring the situation in Darfur to the ICC, *the Security Council* 'accepted that the investigation into the said situation, as well as any prosecution arising therefrom, [would] take place in accordance with the whole Statute'.[77]

In listing these four considerations, the Chamber left many questions about the possible implications of al-Bashir's official status unaddressed. Remarkably, the Chamber did not explain how these considerations linked together and how they supported the conclusion that al-Bashir's status would not

[76] ICC First Arrest Warrant al-Bashir, para. 41.

[77] *Ibid.*, paras. 42-45.

affect the Court's jurisdiction. The Chamber did not consider whether al-Bashir enjoyed immunity under customary international law or whether the Security Council's referral affected his position. While its general observations could be used to address questions about the Court's ability to exercise jurisdiction over al-Bashir, the Chamber did not actually answer any of these questions.

Moreover, the Court's judges did not discuss whether al-Bashir's immunity could pose a procedural bar to cooperation with the Court. Article 98(1) places a procedural duty on the Court to examine whether a request for surrender would require the requested state to violate its obligations under international law. In its ruling of March 2009, the Chamber did not give any indication, however, that it had studied such obligations.[78] The question whether states parties could evade their duty to execute this request by invoking Article 98(1) was simply not addressed.

B. Rulings on al-Bashir's visits to Chad, Kenya and Djibouti (2010-2011)

Following the decision of the AU Assembly in July 2009, the question of the possible application of Article 98(1) became an urgent one when several African states parties welcomed al-Bashir on their territory. In the course of 2010, the President of Sudan first travelled to Chad, for a summit of the Sahel-Saharan states,[79] and then to Kenya to attend the festivities surrounding the adoption of the new Kenyan Constitution.[80] In light of these two visits, it would have made sense for the Chamber to rule on the

[78] The Chamber only noted that the Registrar would have to transmit a cooperation request to all states parties and the members of the Council in accordance with Article 89(1) and 91. *Al-Bashir* (ICC-02/05-01/09-7), Request to all States parties to the Rome Statute for the Arrest and Surrender of Omar al Bashir, 6 March 2009; *Al-Bashir* (ICC-02/05-01/09-8), Request to all United Nations Security Council Members that are not States parties to the Rome Statute for the Arrest and Surrender of Omar al Bashir, 6 March 2009.

[79] According to Chad's Interior and Security Minister, Ahmad Bachir, the standing warrant for his arrest did not raise any problems, because Chad would not have an obligation to arrest al-Bashir, because of his official status. See 'Bashir defies warrant on Chad trip', *Al Jazeera,* 22 July 2010.

[80] Kenyan foreign minister, Moses Wetang'ula, explained that the Sudanese President attended the festivities in response to an invitation to all neighbouring states in the region and noted that 'you do no harm or embarrass your guest ... that is not African'. Later that year, during a meeting with the President of the ASP, Wetang'ula further clarified that Kenya had not arrested al-Bashir in view of 'his country's competing obligations towards the Court, the [AU] and regional peace and stability'. See

scope and application of Article 98(1). Yet, in its response, the Chamber decided to ignore this question. On 27 August, the day that al-Bashir travelled to Kenya, PTC I issued two decisions, in which it 'informed' the Council and the ASP about al-Bashir's recent presence in Chad and about his expected trip to Kenya, 'in order for them to take any measure they may deem appropriate'.[81] In response to the Chamber's decisions, the Council and the ASP did not adopt any measures.[82]

Walter Menya, 'Bashir surprise guest in Kenya', *Daily Nation*, 27 August 2010; ASP, Press Release- President of the Assembly meets Minister of Foreign Affairs of Kenya, ICC-ASP-20100921-PR575, 21 September 2010; 'Kenya pushes back over war crimes suspect's visit', *CNN*, 2 September 2010.

[81] *Al-Bashir* (ICC-02/05-01/09-107), Decision informing the United Nations Security Council and the Assembly of the States parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, 27 August 2010; *Al-Bashir* (ICC-02/05-01/09-109), Decision informing the United Nations Security Council and the Assembly of the States parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, 27 August 2010. In these decisions, the Chamber noted that Chad and Kenya had 'a clear obligation to cooperate with the Court in relation to the enforcement of [the warrant for al-Bashir]'. This obligation would stem from Resolution 1593, in which the Council 'urged all States and concerned regional and other international organizations to cooperate fully', and from Article 87 of the Statute, to which Chad and Kenya are both a party.

[82] The Council could have issued a presidential statement or a Resolution calling upon the states concerned to cooperate with the Court (possibly with the threat of sanctions). The ASP's powers in case of (potential) non-cooperation are less far-reaching than those of the Security Council. Article 112(2)(f) provides that the Assembly shall 'consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation'. Neither the Statute nor the rules of procedure of the ASP explicate the specific measures that the Assembly may take in response to non-cooperation. Note in this regard that al-Bashir's visits to Chad and Kenya were discussed by the Bureau of the ASP, but that no further decisions were taken. See ASP, Bureau of the ASP - thirteenth meeting, 13 September 2010; ASP, Bureau of the ASP - fourteenth meeting, 5 October 2010 ASP, Bureau of the ASP - eighteenth meeting, 23 November 2010; ASP, Bureau of the ASP - twentieth meeting, 9 December 2010; ASP, Bureau of the ASP - first meeting, 11 January 2011 (during this meeting the delegation of Kenya highlighted Article 98 and suggested that it might be necessary to amend the Statute 'to allow for the postponement of the execution of requests for cooperation, for example, in cases where such requests might interfere with ongoing peace processes'). Furthermore, in reaction to reports that al-Bashir would also attend the meeting of the Intergovernmental Authority on Development (IGAD) in Kenya, the PTC requested Kenya to bring to its attention any problem which would impede or prevent Kenya from arresting al-Bashir (in accordance with Article 97). Eventually, however, the IGAD meeting was moved to Addis Ababa at a later date. See *Al-*

These decisions did, however, trigger a powerful reaction from the AU Commission.[83] Through an official communiqué, the Commission expressed 'its deep regret' that these decisions 'grossly' ignored and made 'no reference whatsoever to the obligations of the two countries to the [AU]'.[84] Under Article 23(2) of the AU's Constitutive Act, the Assembly's decisions would be binding on Chad and Kenya, and according to the Commission it would be wrong 'to coerce them to violate' these obligations.[85]

Later that year, after al-Bashir attended the inauguration ceremony of Djibouti's long-sitting President Ismail Omar Guelleh, the Chamber and the AU repeated this 'exchange of views'. The Chamber argued that states parties, like Djibouti, have an obligation to cooperate with the Court, and encouraged the Council and the ASP to take action.[86] In reply, the Council and the ASP did not sanction the respective states, whereas the AU Assembly stressed that Djibouti's decision to welcome al-Bashir was fully in accordance with Article 98(1).[87]

Bashir (ICC-02/05-01/09-117), Decision requesting observations from the Republic of Kenya, 25 October 2010; Michael Onyiego, 'IGAD Summit Postponed Amid Controversy Surrounding Bashir Attendance', *Voice of America*, 27 October 2010.

[83] AU Commission, Press Release on the decision of the Pre-Trial Chamber of the ICC informing the UN Security Council and the Assembly of states parties to the Rome Statute about the presence of President Omar al-Bashir in Chad and Kenya, No/119/2010, 29 August 2010.

[84] *Ibid.*

[85] *Ibid.* In a similar vein, the AU Assembly stated in January 2011 that it also deeply regretted the Chamber's rulings and decided that by receiving al-Bashir Chad and Kenya 'were implementing various AU Assembly Decisions on the warrant of arrest issued by the ICC against President Bashir'. AU Assembly, Decision on the Implementation of the Decisions on the International Criminal Court, Assembly/AU/ Dec.334(XVI), 30-31 January 2011, para. 5.

[86] *Al-Bashir* (ICC-02/05-01/09-129), Decision informing the United Nations Security Council and the Assembly of States parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti, 12 May 2011. Note that al-Bashir's visit was also discussed by the Bureau of the ASP. During the respective meeting, the Permanent Representative of Djibouti declared that its state 'would not make a routine of breaking obligations'. ASP, Bureau of the ASP - seventh meeting, 7 June 2011, pp. 3-4.

[87] AU Assembly, Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/Dec.366(XVII), 30 June-1 July 2011, para. 5.

C. Rulings on the non-cooperation of Chad and Malawi (2011)

Strengthened by the support of the AU and in the absence of measures from the Council or the ASP, al-Bashir travelled to two more African states parties in the second half of 2011. In August, he returned to Chad for the inauguration ceremony of Idriss Deby, who had been re-elected for a fifth term as President of Chad, and in October, he visited Malawi in order to participate in a summit of the Common Market for Eastern and Southern Africa.

This time, however, the Court's judges did not simply inform the Council and the ASP about his presence on the territory of states parties. They decided to initiate formal proceedings against Chad and Malawi under Article 87(7) for failing to cooperate with the Court.[88] While the Chamber's decisions on these two visits did not address why the Court's judges took a different approach in comparison to al-Bashir's earlier visits, one can think of several reasons why they deviated from their initial attempts to pass the matter on to the Council and the ASP. Most likely, the Chamber hoped to trigger a more powerful reaction from the Council and the ASP by formally establishing that African states parties were failing to cooperate. Its earlier decisions had not resulted in any meaningful action from the Court's supporters. The President of the ASP had met with the Kenyan Foreign Minister and the ASP had called upon all states parties 'to comply with their obligations under the Rome Statute, in particular the obligation to cooperate'.[89] Yet, neither the ASP, nor the Council had condemned or sanctioned the respective states. By formally condemning states for their non-cooperation, the Chamber presumably intended to increase pressure on the Council and the ASP to act.

[88] *Al-Bashir* (ICC-02/05-01/09-139), Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 12 December 2011; *Al-Bashir* (ICC-02/05-01/09-140-tENG), Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 13 December 2011.

[89] ASP, Resolution ICC-ASP/9/Res.3, 10 December 2010, para. 6.

In line with Article 87(7) and Regulation 109(3) of the Regulations of the Court, the Chamber asked Chad and Malawi to explain why they had not complied with the demanded arrest of al-Bashir.[90] Chad's reaction was extremely brief. It noted the AU's 'common position' on the case of al-Bashir and argued that as an AU member state, Chad had not been able to accede to the Court's request.[91] Malawi came with a more elaborate response. It argued that the decision to grant al-Bashir immunity was 'in line with the established principles of public international law, and in accordance with the Immunities and Privileges Act of Malawi'.[92] In addition, Malawi claimed that Article 27 would not be applicable in this case because Sudan is not a party to Statute and stressed that it fully aligned itself with the AU's position on the matter.[93]

In response to these observations, PTC I issued two separate, but essentially similar, decisions in December 2011. In these decisions, the Chamber started out by emphasizing the nature of the ICC's cooperation regime.[94] According to the Chamber, it would be for the Court and not for states parties to decide whether Article 98(1) would offer a valid ground to refuse cooperation with the Court. In reference to Article 119(1), which provides that 'any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court', the Chamber stressed that if Chad and Malawi had believed that they could not arrest al-Bashir they should have immediately brought this problem to the attention of the Court's judges. By not doing so, they failed to respect 'the sole authority of [the] Court to decide whether immunities are applicable in a particular case'.[95]

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[90] Regulation 109(3) states that 'before making a finding in accordance with article 87, paragraph 7, the Chamber shall hear from the requested State'.

[91] ICC Chad decision, para. 7.

[92] ICC Malawi decision, para. 8.

[93] *Ibid.*

[94] *Ibid.*, paras. 10-11; ICC Chad decision, para. 10. Since the PTC restated the relevant elements of the Malawi decision in para.13 of the Chad decision, I will hereafter only cite the Malawi decision.

[95] ICC Malawi decision, paras. 10-11. The Chamber could have stopped here to establish that Chad and Malawi had failed to comply with the Court's cooperation requests, but decided 'in light of the significance of the issues' (para. 13) to address the question whether Chad and Malawi could, in theory, have relied on Article 98(1) for not arresting al-Bashir. Note that the PTC

In the second part of its rulings, the Chamber considered, for the first time, whether a state party could potentially rely on Article 98(1) for refusing to arrest al-Bashir.[96] Instead of examining the scope of this provision, however, the Chamber immediately turned to customary international law.[97] In taking what has been described by Claus Kreß as a 'modern positivist approach' to the ascertainment of custom, the Chamber argued that 'the principle in international law' is that the immunities of sitting Heads of State cannot be invoked 'to oppose a prosecution by an international court', because the rationale for these immunities on a domestic level does not apply in relation to international courts.[98]

In reference to the work of the late Judge Antonio Cassese and the ICJ's *obiter dictum* in the Arrest Warrant case, the Chamber observed that while 'national courts might use prosecution to impede or limit a foreign state's ability to engage in international action … this danger does not arise with international courts and tribunals', which are 'totally independent of states and subject to strict rules of impartiality'.[99] Furthermore, the Chamber noted that the Special Court had explained in the Taylor decision that immunities of Heads of State have 'no relevance to international criminal tribunals', because they are 'not organs of a state but derive their mandate from the international community'.[100] From these arguments about the exceptional nature of international courts and the legal authority of the

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also rejected Malawi's reference to internal law in order to justify its failure to comply with the Court's cooperation request (paras. 20-21). This is in line with Article 27 of the VCLT which states that 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

[96] ICC Malawi decision, para. 13.

[97] What the Chamber did note, however, is that 'a waiver of immunity would not be necessary with respect to a third State which has ratified the Statute', as the acceptance of Article 27(2) 'implies waiver of immunities for the purposes of Article 98(1)'. *Ibid.*, para. 18.

[98] *Ibid.*, para. 34. Kreβ, 'The ICC and Immunities', p. 254. As defined by Kreβ, a modern positivist approach to the ascertainment of customary international law assumes that general principles can point to the development of 'modern custom', which may come into existence rapidly and without a voluminous body of state practice and *opinio juris*.

[99] *Ibid.* The Chamber quoted: Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2nd edition, 2008), p. 312.

[100] Special Court, decision on immunities of Taylor, paras. 51-52.

international community as a whole, the judges deduced the principle that immunities play no role with respect to international courts like the ICC.

As a second step in its ascertainment of custom, the Chamber sought to confirm its own deduction by making references to (A) historical precedents of rejecting immunities for Heads of State before international courts; (B) to the increase in the prosecution of Heads of State by international courts; (C) to the strong support of states for the ICC; (D) and finally to the alleged purpose of the Statute:

> (A) *Historical precedents* - The Chamber argued that since the First World War, Heads of State have been denied immunity before international courts; an argument which it based on the jurisprudence of the Nuremburg and Tokyo Tribunals, as well as on the provisions of the Statutes of the ICTY and ICTR which removed immunities as a substantive defence.[101]
>
> (B) *Case law* - The Chamber observed that at the time of the ICJ's ruling in the Arrest Warrant case only one international prosecution of a sitting Head of State had been initiated, namely for Milosevic, but that with the prosecutions of Taylor, Gaddafi, Gbagbo and al-Bashir the international prosecution of Heads of State had 'gained widespread recognition as accepted practice'.[102]
>
> (C) *Strong support for the ICC* - The Chamber recalled, as prove of the support of states for the ICC, that 120 states had ratified the Statute and that the Security Council, including non-parties, had referred two situations to the Court.[103]
>
> (D) *Purpose of the Statute* - Finally, the Chamber argued that if Article 98(1) would relieve a state party from its obligation to arrest al-Bashir, this would 'disable the Court and international criminal justice in ways completely contrary to the purpose of the Statute', which would be to exercise jurisdiction over persons for the most serious crimes of international concern.[104]

[101] ICC Malawi decision, paras. 38, 23-32.

[102] *Ibid.*, para. 39.

[103] *Ibid.*, para. 40.

[104] *Ibid.*, para. 41.

In the opinion of the Chamber, these four references confirmed the asserted principle that 'the international community's commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass'.[105] The Chamber found that there exists 'an exception' under customary international law stipulating that sitting Heads of State do not enjoy immunity 'in respect of proceedings before international courts'.[106] Based on this exception, the Chamber concluded that there does not exist a 'conflict' between the obligations of Chad and Malawi towards the ICC and their obligations under customary international law. These states 'and by extension' the AU would not be 'entitled to rely on Article 98(1) … to justify refusing to comply with' the requests to arrest al-Bashir.[107]

D. Criticism on the Chamber's turn to customary international law

The Chamber's decisions did not lead the Council and the ASP to take any meaningful steps against Chad or Malawi.[108] As with the Chamber's previous decisions, the main result of establishing the non-cooperation of Chad and Malawi was a strongly worded statement of the AU on al-Bashir's immunity. The AU Commission expressed its 'deep regret' over the decisions.[109] According to the Commission, the Court's judges had purported to 'change customary international law', and rendered Article 98(1)

[105] *Ibid.*, para. 42.

[106] *Ibid.*, paras. 43 and 22.

[107] *Ibid.*, para. 37.

[108] Note that the Bureau of the ASP discussed al-Bashir's visits to Chad and Malawi during several meetings: ASP, Bureau of the ASP - seventh meeting, 28 February 2012; ASP, Bureau of the ASP - eighth meeting, 1 March 2012 (meeting specifically devoted to these visits); ASP, Bureau of the ASP - tenth meeting, 10 April 2012; ASP, Bureau of the ASP - twelfth meeting, 29 May 2012; ASP, Bureau of the ASP - thirteenth meeting, 15 June 2012 (highlighting different views within the Bureau on possible measures that could be adopted against Chad. Eventually, the Bureau only took note of the Chamber's response which rejected the Chamber's decisions); ASP, Bureau of the ASP - fourteenth meeting, 9 July 2012.

[109] AU Commission, Press Release on the Decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to Comply with the Cooperation Requests issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan al-Bashir of the Republic of the Sudan, No/002/2012, 9 January 2012.

'redundant, non-operational and meaningless'.[110] In its view, Article 98(1) was included in the Statute 'out of recognition that the Statute is not capable of removing an immunity which international law grants to the officials of states that are not parties to the Rome Statute ... because immunities of state officials are rights of the state concerned and a treaty only binds parties to the treaty'.[111] By ruling that immunities are irrelevant in relation to the ICC, the Chamber would have deprived Sudan and all other non-parties of these rights.[112]

Apart from the AU, the decisions of PTC I also received remarkably strong criticism from prominent commentators, especially for (1) the Chamber's unconvincing analysis of customary international law and (2) for failing to explain the rationale of Article 98(1) in relation to Article 27(2). First of all, questions were posed about the Chamber's modern positivist approach to the ascertainment of custom,[113] the distinction that the Court's judges had drawn between domestic and international

[110] *Ibid.*

[111] *Ibid.*

[112] In a similar vein, the AU Assembly stated in January 2012 that it understood that Article 98(1) confirmed that 'the Statute is not capable of removing an immunity which international law grants to the officials' of non-parties and that 'by referring the situation in Darfur to the ICC, the UN Security Council intended that the Rome Statute would be applicable, including Article 98'. In addition, the Assembly requested the AU Commission 'to consider seeking an advisory opinion from the [ICJ] regarding the immunities of State Officials under international law'. In a follow-up to this request, the Assembly endorsed a proposal of the Ministers of Justice and Attorneys General of the AU member states in July 2012 to approach the ICJ, through the UN General Assembly, for an advisory opinion on 'the question of immunities, under international law, of Heads of State and senior state officials from states that are not parties to the Rome Statute of the ICC'. However, this proposal never gained much momentum in the General Assembly. AU Assembly, Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/Dec.397(XVIII), 29-30 January 2012, paras. 6 and 10; AU Assembly, Decision on the implementation of the Decisions on the International Criminal Court, Assembly/AU/Dec.419(XIX), 15-16 July 2012, para. 3. For a brief discussion and further references on the proposal of an ICJ Advisory Opinion, see section VI(C) in this chapter.

[113] Göran Sluiter argued, for example, that the Chamber's determination of customary international law fell 'out of the sky' and did not make 'any 'serious analysis of state practice and *opinio juris*'. See Göran Sluiter, 'ICC's Decision on Malawi's Failure to Arrest Al Bashir Damages the Authority of the Court and Relations with the African union', *IlawyerBlog*, 6 March

courts,[114] and especially about the precedents and traces of state practice that the Chamber invoked in support for the asserted exception under customary international law.[115] For example, while Milosevic and Taylor were sitting Heads of State at the time of their indictment, they were no longer in office during the time of their arrest. Neither could the cases of Gbagbo and Gaddafi qualify as precedents. They were not only indicted after al-Bashir, but Gbagbo was transferred to the Court with the consent of his home state (at a time that he was no longer in office) and Gaddafi was never arrested. Moreover, the Chamber did not address any countervailing evidence. It did not take into account, for instance, that many states parties do distinguish in their national legislation between the immunities of states parties and non-parties to the ICC.[116]

Secondly, in addition to concerns about the Chamber's analysis of customary international law, commentators emphasized that the Chamber failed to explain the rationale of Article 98(1) in relation to Article 27(2).[117] Why would Article 98(1) be there at all, if the personal immunities of the officials of non-parties would be completely irrelevant before the ICC? The Chamber essentially pretended that Article 98(1) 'was not included in the Statute'.[118] This silence was deemed problematic not just because of the AU's reference to Article 98(1), but also because Article 21 stipulates that the Court's judges can only resort to customary international law, when there is a *lacuna* in the written law of the Court itself.

2012. See also Kress, 'ICC and Immunities, pp. 250-258; Dov Jacobs, 'A Sad Hommage to Antonio Cassese: The ICC's confused pronouncements on State Compliance and Head of State Immunity', *Spreading the Jam*, 15 December 2011.

[114] See Akande, 'ICC Issues Detailed Decision on Bashir's Immunity'. See also Kiyani, 'Al-Bashir and the ICC', 491-497; Ssenyonjo, 'AU Opposition to ICC', 410-411; Daqun, 'ICC and Immunities', p. 65. Kreβ, 'ICC and Immunities', pp. 246-250; Nouwen, 'Immunity of Taylor', 655-658.

[115] See Kiyani, 'Al-Bashir and the ICC', 487-489; Daqun, 'ICC and Immunities', p. 65; Akande, 'ICC Issues Detailed Decision on Bashir's Immunity'; Jacobs, The ICC's Approach to Immunities and Cooperation', pp. 286-289.

[116] As discussed in Akande, 'ICC Issues Detailed Decision on Bashir's Immunity'. For a detailed analysis of customary international law on this matter, see the Minority Opinion of Judge de Brichambaut, paras. 84-96.

[117] See, for example, Tladi, 'The ICC Decisions on Chad and Malawi', 207; Kiyani, 'Al-Bashir and the ICC', 490; Jacobs, The ICC's Approach to Immunities and Cooperation', pp. 293-294. Ssenyonjo, 'AU Opposition to ICC', 409; Akande, 'ICC Issues Detailed Decision on Bashir's Immunity.

[118] Tladi, 'The ICC Decisions on Chad and Malawi', 199.

At no point in the decision did the Chamber discuss why it had to rely on customary international law in the first place.

In short, after initially trying to pass the matter on to the Security Council and the ASP, PTC I firmly rejected the AU's immunity claim, because there would be an exception under customary international law. The AU's reference to Article 98(1) and the underlying juxtaposition between arrest and immunity would be an outdated one. The Court's judges reached this conclusion, however, without explaining the purpose of Article 98(1). For this reason, as well as the unconvincing analysis of state practice and *opinio juris*, the Chamber's initial response to the AU's position on the immunity of al-Bashir was widely criticized by commentators. This criticism on the Chamber's turn customary international law marked the way for a revision of the Chamber's response in its later decisions on the non-compliance of African states parties.

IV. The Revised Responses of Pre-Trial Chamber II

Shortly after PTC I issued its rulings on the non-cooperation of Chad and Malawi, the constitution of the Pre-Trial Chambers changed and the situation of Darfur, including the case against al-Bashir, was assigned to PTC II, composed of Presiding Judge Trendafilova and Judges Kaul and Tarfusser.[119] In first instance, however, this new composition did not lead to a different position on the question of al-Bashir's immunity, nor did PTC II take the first opportunity that came along to address the strong criticism that the rulings of PTC I had received.

In response to al-Bashir's next trip to Chad in early 2013, the new Chamber limited itself to saying that Chad had again failed to respect its obligations under the Statute 'by deliberately refusing to arrest him'.[120] Later that year, after al-Bashir briefly attended a special summit of the AU in Abuja

[119] *ICC Presidency* (ICC-02/05-241), Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d'lvoire situations, 15 March 2012.

[120] *Al-Bashir* (ICC-02/05-01/09-151), Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad al-Bashir, 27 March 2013. Note that in contrast

(Nigeria), the Chamber was satisfied with Nigeria's explanation that the Sudanese President had left the country at a time that the Nigerian authorities 'were considering the necessary steps to be taken … in line with Nigeria's obligations'.[121] While Nigeria did not say that it was under the obligation to arrest al-Bashir and even though Nigeria did not explain why it had not contacted the Court upon al-Bashir's arrival,[122] the Court's judges decided, without giving any further reasons, 'that it [was] not warrant[ed] in the present circumstances' to refer Nigeria to the Council and/or the ASP.[123]

In both cases, the new Chamber could have addressed al-Bashir's immunity, but did not really need to. Neither Chad (which did not reply to the Court at all) nor Nigeria made any claims in this

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to its previous rulings, the Chamber did not refer to the Security Council referral as a source of Chad's obligation to arrest al-Bashir. This visit was repeatedly discussed by the Bureau of the ASP, which could - again - not agree on any measures. See ASP, Bureau of the ASP - first meeting, 12 February 2013; ASP, Bureau of the ASP - second meeting, 20 March 2013; ASP, Bureau of the ASP - third meeting, 27 April 2013.

[121] On Sunday 14 July 2013, the Sudanese President was received 'with a full guard of honour' in the Nigerian capital, Abuja, where he was intended to speak at the Special Summit of the AU. 'Sudan's President Bashir leaves AU summit in Nigeria', *BBC News*, 16 July 2013. After making a brief appearance during the opening of the summit, however, al-Bashir left the country on Monday afternoon, without giving his scheduled speech. According to the observations of the Nigerian Attorney General and Minister of Justice, Mohammed Belo Adoke, this 'sudden departure ... occurred at the time that officials of relevant bodies and agencies of the Federal Government of Nigeria were considering the necessary steps to be taken in respect of his visit in line with Nigeria's international obligations'. *Al-Bashir* (ICC-02/05-01/09-158-Anx4), Report of the Registry on al-Bashir's visit to Nigeria - Public Annex 4, 14 August 2013.

[122] In this regard, it is noteworthy that several media sources reported more than two days before al-Bashir's actual trip that he would attend the Summit. See 'Sudanese president will "soon" travel to Nigeria: ambassador', *Sudan Tribune*, 11 July 2013; 'Rights groups slam Sudanese president's upcoming visit to Nigeria', *Sudan Tribune*, 13 July 2013.

[123] *Al-Bashir* (ICC-02/05-01/09-159), Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar al-Bashir's Arrest and Surrender to the Court, 5 September 2013, para. 13. Note that on 15 July, the PTC had issued a decision calling upon Nigeria to arrest al-Bashir. *Al-Bashir* (ICC-02/05-01/09-157), Decision Regarding Omar Al-Bashir's Visit to the Federal Republic of Nigeria, 15 July 2013. On the same day, the Nigerian Coalition of the ICC also filed a suit at the federal High Court of Abuja seeking a domestic arrest warrant for al-Bashir and the UK Foreign Minister expressed its disappointment over Nigeria's decision to host al-Bashir. See Mark Simmonds (Foreign Office Minister UK), 'FCO Minister comments on Sudanese President's visit to Nigeria', Foreign & Commonwealth Office, 15 July 2013. Al-Bashir's visit to Nigeria was briefly discussed in ASP, Bureau of the ASP - eighth meeting, 19 July 2013.

direction. Al-Bashir's next visit, however, which went to the DRC, pushed the Court's judges to reconsider the issue. Unlike Chad and Nigeria, the DRC specifically referred to Article 98(1) and to the decisions of the AU Assembly to justify its non-cooperation. In response to the DRC's arguments, and perhaps implicitly to the strong criticism that the Chad and Malawi decisions had received, PTC II decided to take a different approach than PTC I.

A. Ruling on the non-cooperation of the DRC (2014)

From the late evening of 25 February until the early morning of 27 February 2014, the DRC hosted President al-Bashir for a summit of the Common Market for Eastern and Southern Africa (COMESA) in Kinshasa. After al-Bashir had left the country, and when asked by the Court's judges to explain why the DRC had not arrested the Sudanese President, Minister of Justice Wivine Mumba Matipa argued in her observations to the Chamber that this was the result of 'time and legal constraints'.[124] According to the Minister, al-Bashir's presence had placed the DRC in a 'delicate and unmanageable situation' because the DRC is a party to the ICC as well as a member of the AU.[125] Since the Government would only have known at a very late stage that al-Bashir had been invited by COMESA, and given that it had only received the Chamber's decision on the 26th, the thirty-six hours of his visit would not have been sufficient to make a decision with such 'legal, diplomatic and security implications'.[126] The Minister stressed that without this time constraint the Government would certainly 'have contacted the Court and presented [these] difficulties'.[127]

In specifying the legal constraints that the DRC had identified, the Minister recalled that under Articles 87 and 89 of the Statute the DRC was 'under an international obligation to arrest' al-Bashir. In the DRC's view, however, these provisions would have to 'be read in conjunction' with Article 98(1).[128]

[124] *Al-Bashir* (ICC-02/05-01/09-190-AnxII-tENG), Report of the Registry on al-Bashir's visits to the DRC - Public Annex 2, 27 March 2014, p.5 (official Court translation).

[125] *Ibid.*, p. 6, at d.

[126] *Ibid.*, p. 6 at e

[127] *Ibid.*, p. 6 at f.

[128] *Ibid.*, p. 6 at 2.

According to its observations, 'a parallel' would have to be drawn between Article 98(1) and the decision of the AU Assembly from October 2013 that no AU Head of State should have to appear before an international court like the ICC, in the sense that 'both instruments [would] recognise the notion of immunity and construe it as an international legal constraint'.[129] Since the DRC would have to respect its obligations towards the AU, and given that the 'Court did not comply with [the] requirement' of Article 98(1) to the extent that it should first have obtained 'a waiver of immunity from the third State, namely Sudan', the Minister concluded that 'the DRC could not act beyond what it [was] legally permitted to do'.[130]

In the first part of its response to these observations, the Chamber emphasized that 'in the absence of proper and logical justification', a standard that Nigeria apparently had fulfilled, it could not accept the DRC's alleged time constraints.[131] The Court's judges concluded that the Congolese authorities should have consulted the Court 'of the problem faced under Article 98(1) … instead of deciding itself on its applicability'.[132] As in the decision of PTC I on the non-cooperation of Chad and Malawi, PTC II thus stressed the (vertical) nature of its cooperation regime (*i.e.*, the Court decides) and found that the DRC had breached its obligations by not consulting the Court.

The Chamber then continued to discuss whether a state party could potentially rely on Article 98(1) for refusing to arrest al-Bashir. In contrast to PTC I, the Court's judges did not answer this question on the basis of customary international law. Instead, PTC II turned attention to the rationale of Article 98(1) in relation to Article 27(2). The Chamber found that Article 27(2) provides an 'exception' to customary international law and that this exception 'should, in principle be confined to those states parties who have accepted it'.[133] This limitation to the scope of Article 27(2) would follow from the fact

[129] *Ibid.*, p.7.

[130] *Ibid.*, pp. 7-8.

[131] *Al-Bashir* (ICC-02/05-01/09-195), Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, 9 April 2014, para. 17. See also paras. 13-16.

[132] *Ibid.*, para. 22.

[133] *Ibid.*, para. 26.

that the Statute 'is a multilateral treaty … governed by the rules set out in the [VCLT]', [134] including Article 34 which makes clear that a treaty cannot impose obligations on third states without their consent.[135]

The consequence of this would be that 'when the exercise of jurisdiction by the Court entails the prosecution of a Head of State of a non-party, the question of personal immunities might validly arise'.[136] According to the Chamber, the solution to resolve 'such a conflict' is to be found in Article 98(1).[137] This provision directs the Court to secure the cooperation of the non-party 'for the waiver or lifting the immunity of its Head of State'.[138] As argued by the AU, the Chamber found that Article 98(1) prevented a state party from being forced to act 'inconsistently with its international obligations towards the non-party with respect to the immunities attached to the latter's Head of State'.[139]

After having explained the rationale of Article 98(1) in relation to Article 27(2), and thus addressing one of the main points of critique about the decisions of PTC I, the Chamber questioned whether the DRC faced the situation of competing obligations that is foreseen in Article 98(1). In answering this question, the Chamber distinguished between (A) the DRC's obligation to respect al-

[134] *Ibid.*, para. 26.

[135] *Ibid.* The PTC acknowledged that there are two exceptions to this rule under the VCLT, as provided for under Articles 35 and 38. Furthermore, the Chamber referred to a number of earlier rulings, including *Al-Senussi* (ICC-01/11-01/11-420), Decision on the request of the Defence of Abdullah al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council, 28 August 2013, para. 12 (citing Article 34 VCLT, while noting that 'this principle may be altered by the Security Council, which may, in accordance with the Charter of the [UN], impose an obligation to cooperate with the Court on those United Nations Member states that are not parties to the Statute').

[136] *Ibid.*, para. 27.

[137] *Ibid.*

[138] *Ibid.* Note that the decision is not clear on whether Article 98(1) only applies to non-parties (which is especially relevant in relation to 'the property of the third state'). The Chamber refers at some points to non-parties and at others more generally to third states. For further discussion and references, see part II(B) in this chapter.

[139] *Ibid.*

Bashir's immunity from arrest under customary international law, and (B) its obligation to act in accordance with the binding decisions of the AU Assembly.[140]

As to the first obligation, the Chamber found that in the present case there would not be any inconsistency between the obligation to arrest al-Bashir and the obligation to respect his immunity, because the Security Council 'implicitly waived [his] immunities under international law'.[141] When the Council referred the situation in Darfur, it obliged Sudan 'to cooperate fully with and provide any necessary assistance to the Court' (para. 2 of Resolution 1593).[142] According to the Chamber, this cooperation requirement 'was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities', because any other interpretation would render Sudan's obligation to cooperate fully 'senseless'.[143] On the basis of this argument, the Chamber concluded that al-Bashir no longer enjoyed any immunity under customary international law and that there does not exist any 'impediment at the horizontal level between the DRC and Sudan' which could justify the DRC's decision to refuse to arrest al-Bashir.[144]

As to the DRC's obligation to respect the decisions of the AU Assembly, the Chamber noted that 'the conflicting obligations which the DRC claims exist are not merely between the [AU] and the Court'.[145] The actual 'conflict' would lie between the decisions of the AU Assembly to retain the

[140] This points to another juxtaposition that the AU has advanced against the prosecution of al-Bashir, namely between the obligations that African states parties have under the Rome Statute and their obligations under the AU Constitutive Act. See Jacobs, 'The ICC's Approach to Immunities and Cooperation', pp. 299-301.

[141] *Ibid.*, para 29.

[142] *Ibid.*

[143] *Ibid.* Note that the Chamber added that otherwise the immunity of al-Bashir would form 'a procedural bar from prosecution before the Court'. In explaining the term 'procedural bar', the Chamber referred to ICJ, 'Jurisdictional Immunities of the State', para. 58 (relevant part: 'as the Court has stated … the law of immunity is essentially procedural in nature … it regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful').

[144] *Ibid.*, para. 29.

[145] *Ibid.*, para. 30

immunity of al-Bashir and Resolution 1593 'which removed such immunity for the purpose of the proceedings before the Court'.[146] In the opinion of the Court's judges, this conflict would be 'resolved by virtue of Articles 25 and 103 of the UN Charter'.[147] In reference to the considerations of the ICJ in the Namibia Opinion and the Lockerbie case, the Chamber stressed that the DRC's obligation to respect the decision of the Council prevails over 'any other decision, including that of the [AU], providing for any obligation to the contrary'.[148] By not arresting al-Bashir, the DRC would not only have disregarded its obligations under the Statute, but also its obligations under Resolution 1593 and as such the Charter.

In sum, in its decision on the non-cooperation of the DRC, PTC II overturned the rulings of PTC I on the non-cooperation of Chad and Malawi, but came to the same conclusion in the sense that Article 98(1) would not enable states parties to evade their obligation to arrest al-Bashir.[149] In the much criticized decisions of PTC I, the Court's judges argued that there is an exception to customary international law. In the DRC decision, PTC II rejected this interpretation and found that the Council had implicitly removed al-Bashir's immunity from arrest.

[146] *Ibid.*

[147] *Ibid.*

[148] *Ibid.*, para. 31. See *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, [1992] ICJ Rep 3, para. 37; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep 16, para. 116. For further discussion on the Namibia Opinion, see part V(B) in this chapter.

[149] Note that several scholars have criticized the Chamber's new ruling for not explicitly addressing the Chad and Malawi decisions. See for example Gaeta, 'ICC Changes its Mind on Immunities Al-Bashir'. In response, de Wet has observed that this criticism ignores the fact that it is rare for chambers of international courts and tribunals to openly criticize a decision of a different chamber. This would be simply be 'a reality of international adjudication'. De Wet, 'Implications of Al-Bashir's Visit to South Africa', 1057.

B. Al-Bashir's visit to South Africa (2015)

In contrast to its earlier rulings, the DRC decision did not receive much attention from the AU.[150] With this silence the AU did certainly not intend to signal support for the Chamber's revised approach. In its 2012 communiqué on the case against al-Bashir, the AU Commission already rejected the suggestion that the Council somehow removed al-Bashir's immunity by saying that 'such lifting should have been explicit', and that the 'mere referral of a 'situation' … to the ICC or requesting a state to cooperate with the ICC [should not] be interpreted as lifting immunities granted under international law'.[151]

The real reason why the AU Commission and the Assembly did not spend much energy on the Chamber's new approach, was that the case against al-Bashir had moved down on the AU's political agenda. In the middle of the battles surrounding the prosecution of Kenyatta and Ruto, which were at a high point in 2014, the AU's claim that al-Bashir enjoyed immunity from arrest was simply not the main priority. The AU continued to underscore that all member states have an obligation to comply with the Assembly's decision on the arrest warrants for al-Bashir, but the focus of the AU's campaign against the prosecution of African presidents had shifted from Sudan to Kenya.[152]

The question of al-Bashir's immunity regained political momentum again in June 2015, when South Africa hosted the Sudanese President for a summit of the AU. In the years before this trip, the South African Government had taken a different position than the AU on the prosecution of al-Bashir.

[150] In the next decision of the AU Assembly from January 2015, the African Heads of State and Government did not even mention the decision, but only commended the DRC 'for complying with [the] AU Decision for non-cooperation for the arrest and surrender of President Omar Al Bashir'. AU Assembly, Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court, Assembly/AU/Dec.547(XXIV), 30-31 January 2015, para. 18. Note that al-Bashir's visit to the DRC was discussed in ASP, Bureau of the ASP - second meeting, 17 March 2014; ASP, Bureau of the ASP - third meeting, 16 April 2014.

[151] AU Commission, Press Release Decisions PTC I. Uganda (on behalf of the AU) in ASP, General Debate of the Twelfth Session, 20-26 November 2013.

[152] AU Assembly, Decision January 2015, paras. 3 and 19. AU Assembly, Decision on the update of the Commission on the Implementation of Previous Decisions on the International Criminal Court, Assembly/AU/Dec.586 (XXV), 14-15 June 2015, para. 2(ii).

South Africa had supported the AU's deferral bid,[153] but had not allowed the Sudanese President to visit the country on numerous occasions such as the two inauguration ceremonies of President Zuma, the 2010 Football World Cup and the funeral of former President Nelson Mandela in 2013.[154] In fact, South African officials had repeatedly declared that South Africa intended to live up to its obligations under the Rome Statute and that South Africa would arrest al-Bashir if it would get the opportunity to do so.[155] Because of all this, many observers were caught by surprise when news agencies reported that al-Bashir would attend the 25th summit of the AU in Johannesburg.[156]

In response to these news reports on al-Bashir's scheduled visit, the Registrar of the ICC sent a *note verbale* to the South African embassy in The Hague on 28 May and reminded South Africa of its obligation to arrest al-Bashir.[157] Following this reminder, South Africa requested consultations under Article 97 on 11 June 2015. This last minute request, which was made only 48 hours before al-Bashir's

[153] See the statement of South Africa in UNSC, S/PV.6028, 3 December 2008; ASP, General Debate of the Seventh Session, 14-22 November 2008; UNGA, A/64/PV.29, 29 October 2009.

[154] The High Court stated in its decision 'that it is common cause that during 2009, President Bashir was invited by South Africa to attend the inauguration of President Zuma in South Africa… [but that] South African officials confirmed that they would arrest President Bashir should he arrive in the country. For this reason President Bashir declined South Africa's invitation to attend the inauguration'. See Southern Africa Litigation Centre v. Minister of Justice And Constitutional Development and Others, Final Judgment Gauteng Division of the High Court, 24 June 2015, para. 12.

[155] *Ibid*. See also 'South Africa reverses course on ICC warrant for Bashir', *Sudan Tribune*, 31 July 2009; 'Notes following the Briefing of Department International Relations and Cooperation's Director-General, Ayanda Ntsaluba', *SA News*, 31 July 2009.

[156] Within diplomatic circles, however, al-Bashir's presence was probably on the agenda for quite some time and may have already been talked over by President Zuma with al-Bashir during his official state visit to Khartoum in February 2015. Presidency of South Africa, 'President Zuma to undertake a Working Visit to Sudan', 29 January 2015. Formally speaking, the South African Government was informed by the AU in early June that al-Bashir would attend the summit. This notification let to discussions within the South African Cabinet in which it was decided that al-Bashir would not be arrested. For further details, see Ventura, 'Escape from Johannesburg?', 998.

[157] *Al-Bashir* (ICC-02/05-01/09-242), Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir, 13 June 2015, para. 3.

arrival, let Presiding Judge Tarfusser of PTC II to convene an urgent meeting at the Court.[158] During this meeting, South Africa informed the Chamber that it foresaw difficulties in implementing the request for cooperation with the arrest of al-Bashir because 'there was lack of clarity in the law and [because] … South Africa was subject to competing obligations'.[159]

In addressing these alleged difficulties, Judge Tarfusser explained during the meeting, however, that there exists 'no ambiguity in the law', that South Africa is under a clear obligation to arrest al-Bashir, and that any (further) consultations between the Court and South Africa under Article 97 would 'not trigger any suspension or stay of this standing obligation'.[160] The following day, Judge Tarfusser also issued a public decision on the matter, in which he recalled the DRC decision, and underscored that the Chamber had left 'no ambiguity or uncertainty' with respect to South Africa's obligation to arrest the Sudanese President.[161] Judge Tarfusser concluded that since there is 'no issue which remains unclear or has not already been explicitly discussed and settled by the Court, the consultations under [A]rticle 97 … [had] ended' and that no further reminder or clarification was necessary.[162]

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[158] According to Judge Tarfusser, this was a meeting for the purpose of consultations under Article 97 (para. 5). South Africa has claimed, however, that this was 'a preliminary meeting between the Government and the Court… and [that] it was the understanding of the Government that the official Article 97 consultations were to take place on Monday 15 June 2015. See *Al-Bashir* (ICC-02/05-01/09-248-AnxI), Submission from the Republic of South Africa in response to the Order requesting a submission dated 4 September 2015 for the purposes of proceedings under Article 87(7) of the Rome Statute, 2 October 2015, para. 1.3. In its decision on the non-cooperation of South Africa (2017), the Chamber confirmed that the meeting was a meeting for the purpose of consultations under Article 97 and that these consultations were closed after this meeting because the matter raised by South Africa 'could be settled only as part of a judicial process and with reference to the applicable law, rather than through a "political and diplomatic process" '. ICC South Africa decision (2017), para. 118.

[159] ICC South Africa decision (2015), para. 4. *Al-Bashir* (ICC-02/05-01/09-243), Registry Report on the consultations undertaken under Article 97 of the Rome Statute by the Republic of South Africa and the departure of Omar Al Bashir from South Africa on 15 June 2015, 17 June 2015.

[160] ICC South Africa decision (2015), paras. 8 and 5.

[161] *Ibid.*, para. 1.

[162] *Ibid.*, para. 8. Note, however, that the report of Registry mentions that on the day of al-Bashir's departure (15 June) the South African embassy send a note verbale in response to the decision of Judge Tarfusser (confidential as annex VI to the

In addition to calls from the Court and other international actors,[163] the South African Government was pressured by its own judiciary to cooperate with the ICC. Upon al-Bashir's arrival on Saturday 13 June 2015, the South African Litigation Centre (SALC), a prominent NGO in the field of human rights, brought an urgent application to the Gauteng Division of the High Court of South Africa (the High Court), requesting an order for the arrest of al-Bashir.[164] In response to this application, the South African Government submitted in its answering affidavit that al-Bashir enjoyed immunity from arrest, *inter alia*, on the basis of a host-state agreement that it had concluded with the AU Commission.[165] In its ruling on Monday 15 June, which was issued around 15:30 local time,[166] the High Court rejected the Government's arguments, and found that al-Bashir did not enjoy immunity from arrest in South Africa. The High Court granted the application of the SALC and compelled the South African Government 'to take all reasonable steps to prepare to arrest President Bashir'.[167]

By the time that the High Court issued its oral ruling, however, al-Bashir had already left South Africa. Judge Fabricus of the High Court had issued a provisional order on Sunday 14 June, which

report) which submitted 'that as far as the authorities had been able to establish the consultations under Article 97 had not taken place'. South Africa later stated that it considered the decision of Judge Tarfusser 'in violation… of [its] basic right to fair procedure'. See ICC Submission South Africa (October 2015), para. 1.5.

[163] EU Statement by Spokesperson on South Africa and the International Criminal Court, 14 June 2015; John Kirby, 'Press Statement - Travel of Sudanese President Bashir to South Africa', 14 June 2015. For reactions of civil society organizations, see 'No business as usual as al-Bashir flees South Africa', Coalition for the ICC, 16 June 2015.

[164] For an overview of the proceedings before the High Court, see Southern Africa Litigation Centre v. Minister of Justice And Constitutional Development and Others, Final Judgment Gauteng Division of the High Court, 24 June 2015, paras. 4-9. For a detailed discussion of these proceedings, see also Ventura, 'Escape from Johannesburg?', 997-998, 1001-1005.

[165] Southern Africa Litigation Centre v. Minister of Justice And Constitutional Development and Others, Respondents Answering Affidavit, 15 June 2015, para. 3.

[166] Southern Africa Litigation Centre v. Minister of Justice And Constitutional Development and Others, Explanatory Affidavit of the Director General of the Department of Home Affairs, 25 June 2015, para. 3.

[167] The Chamber gave its reasons for this order in its written judgment on 24 June 2015. For a summary and analysis of the judgment, see Ventura, 'Escape from Johannesburg?', 1005-1016; Tladi, 'Duty South Africa to Arrest al-Bashir', 1031-1032; De Wet, 'Implications of Al-Bashir's Visit to South Africa', 1051-1053.

explicitly prohibited al-Bashir from leaving South Africa until the High Court had ruled on the application, and had directed the South African Government 'to take all necessary steps to prevent him from doing so'.[168] Yet, despite this order, al-Bashir flew out from the military airbase at Waterkloof shortly before noon on Monday.

In the week following this dramatic departure, South African and international news agencies quoted sources close to the Government speaking of a 'secret hotel meeting' in which a group of government ministers had agreed to do anything to protect al-Bashir, 'even if it meant flouting court rulings and undermining the constitution'.[169] The South African Government, however, denied that this meeting ever took place. In an official statement on 22 June, a Government spokesperson said that these media reports were based on 'nameless and faceless sources' and that the Government remained committed 'to finalize this matter through the court processes'.[170] The statement further noted that the Government was expected 'to provide the [High Court] with a report that explains how President al-Bashir left the country'.[171]

Three days later, this report was provided by way of an explanatory affidavit of the Director General of the Department of Home Affairs of South Africa.[172] The Director General, Mkuseli Apleni, presented several documents in order to prove that he had served the provisional order of Judge Fabricus to all 72 points of entry and exit from South Africa, including the military airbase at Waterkloof.[173] By the time that news reports appeared saying that al-Bashir had left the country, Apleni said to have contacted the immigration officials that were on duty at the airbase in order to verify this information.

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[168] Southern Africa Litigation Centre v. Minister of Justice And Constitutional Development and Others, Interim Court Order, 14 June 2015, paras. 1-2.

[169] Mizilikazi Wa Afrika, Piet Rrampedi and Stephan Hofstatter, 'The truth behind Bashir's great escape', *Sudan Times*, 21 June 2015. See also 'South Africa denies plot to allow Omar al-Bashir to leave', *BBC News*, 22 June 2015.

[170] 'No secret meeting held to protect President al-Bashir', *South African Government News Agency*, 22 June 2015.

[171] *Ibid.*

[172] Southern Africa Litigation Centre v. Minister of Justice And Constitutional Development and Others, Explanatory Affidavit of the Director General of the Department of Home Affairs, 25 June 2015.

[173] *Ibid.*, para. 5-6.

According to Apleni, the respective officials informed him that the presidential airplane of Sudan had left, but 'that the passport of President Bashir was not part of the passports that were handed to immigration for processing of the persons that were on board of the flight'.[174] The Director General further explained that it is regular procedure that the passengers on a 'VIP flight' do not personally appear before immigration officials. Because of this regular procedure, al-Bashir could fly out of South Africa, according to Apleni, even though the order of the High Court had been served to all immigration officials.[175]

This remarkable explanation for al-Bashir's escape and the Government's persistent claim that the Sudanese President enjoyed immunity from arrest became the subject of proceedings before the domestic courts of South Africa. In the course of these proceedings, the High Court and subsequently the Supreme Court of Appeal established that the South African Government had breached its obligations under both domestic and international law by failing to arrest al-Bashir.[176] Meanwhile, the ICC's Pre-Trial Chamber waited its turn. In October 2015, the Chamber granted a request from South

[174] *Ibid.*, para. 7.

[175] *Ibid.*, para. 11.4.

[176] Upon the judgment of the High Court, the South African Government first sought leave to appeal from the High Court itself (which was denied), and then from the Supreme Court of Appeal. Southern Africa Litigation Centre v. Minister of Justice And Constitutional Development and Others, Judgment Gauteng Division of the High Court on Application for Leave to Appeal, 15 September 2015; Southern Africa Litigation Centre v. Minister of Justice And Constitutional Development and Others, Notion of Motion in the Supreme Court of Appeal of South Africa, 30 September 2015. The Supreme Court of Appeal issued its decision in early 2016, ruling that the South African Government had breached its obligations under domestic law and under the Rome Statute by failing to arrest al-Bashir. Minister of Justice and Constitutional Development v. Southern African Litigation Centre, Judgment Supreme Court of Appeal of South Africa, 15 March 2016. For an analysis of the ruling of the Supreme Court of Appeal, see Dapo Akande, 'The Bashir Case: Has the South African Supreme Court Abolished Immunity for all Heads of States?', *EJIL Talk*, 29 March 2016; Dire Tladi, 'Interpretation and International Law in South African Courts: The Supreme Court of Appeal and the Al Bashir Saga' (2016) 16 *African Human Rights Law Journal* 310-338.

Africa to extend the time limit to submit its views on the events surrounding al-Bashir's attendance of the AU summit until 'the domestic proceedings are finalised'.[177]

C. Ruling on the non-cooperation of South Africa (2017)

The domestic proceedings on al-Bashir's visit to South Africa were concluded in late 2016. Shortly after announcing its intention to withdraw from the Rome Statute,[178] the South African Government decided to retract its appeal before the Constitutional Court of South Africa.[179] Following this decision, the ICC moved along with the proceedings under Article 87(7) of the Statute on the alleged non-compliance by South Africa.

In contrast to the Chamber's previous proceedings on al-Bashir's visits to African states parties, the Court's judges accorded South Africa as well as the Prosecutor an opportunity to express their views

[177] *Al-Bashir* (ICC-02/05-01/09-249), Decision on the request of the Republic of South Africa for an extension of the time limit for submitting their views for the purposes of proceedings under article 87(7) of the Rome Statute, 15 October 2015. The PTC further ordered the competent authorities of South Africa to promptly report to the Chamber on any developments in the relevant domestic judicial proceedings as they occur. Following the Chamber's decision, South Africa submitted three reports concerning the progress of the ongoing domestic judicial proceedings before its national courts on 21 and 24 December 2015, and on 4 May 2016.

[178] UN Treaties Collection (C.N.786.2016.TREATIES-XVIII.10), Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court, 19 October 2016.

[179] The South African Government initially appealed the decision of the Supreme Court of Appeal and put its arguments to the Constitutional Court. However, upon its decision to withdraw South Africa from the Rome Statute, the Government announced that it would no longer pursue the appeal. For further discussion on this matter, see Dapo Akande, 'South African Withdrawal from the International Criminal Court - Does the ICC Statute Lead to Violations of Other International Obligations?', *EJIL Talk*, 22 October 2016.

on the matter in a public hearing.[180] During this hearing, which took place on 7 April 2017,[181] South Africa argued that 'fundamental errors had occurred' in the conduct of the requested consultations under Article 97.[182] In the absence of specific rules, the consultations had wrongly been subjected to a 'quasi-judicial rather than a diplomatic and political process'.[183] Furthermore, on the question of immunity, South Africa submitted that at the time of al-Bashir's visit there was 'ambiguity and uncertainty' with respect to the obligation of South Africa to arrest and surrender the Sudanese President.[184] South Africa pointed to inconsistencies in the Chamber's previous decisions,[185] and challenged the DRC decision on the ground that 'it lacked reasoning for its crucial finding', namely that the Security Council referral constitutes a waiver of al-Bashir's immunity.[186] In essence, South Africa took the position that al-

[180] *Al-Bashir* (ICC-02/05-01/09-274), Decision convening a public hearing for the purposes of a determination under article 87(7) of the Statute with respect to the Republic of South Africa, 8 December 2016. PTC II also gave an opportunity to representatives of the United Nations to express their views, but the UN Under-Secretary-General for Legal Affairs and United Nations Legal Counsel responded that it would not be sending a representative to attend the hearing and would not be making written submissions for the Chamber's consideration. According to the Prosecutor, this was 'a missed opportunity for the organisation to pronounce on the important issue of non-compliance in relation to a situation that the Council referred to the Prosecutor'. As stated in UNSC, S/PV.7963, 8 June 2017. Note that the Chamber did receive written observations from the Kingdom of Belgium and from the Southern African Litigation Centre. For a summary of these observations, see ICC South Africa decision (2017), paras. 54-56.

[181] *Al-Bashir* (ICC-02/05-01/09-T-2-ENG), Public Court Records, 7 April 2017.

[182] ICC South Africa decision (2017), para. 27. *Al-Bashir* (ICC-02/05-01/09-290), Submission from the Government of the Republic of South Africa for the purposes of proceedings under Article 87(7) of the Rome Statute, 17 March 2017, paras. 28-49.

[183] *Ibid.*

[184] ICC South Africa decision (2017), para. 31; Public Court Records, 7 April 2017, p. 19, lines 1-4.

[185] Submission South Africa, para. 70.

[186] ICC South Africa decision (2017), para. 31; Submission South Africa, paras. 61-67; Public Court Records, 7 April 2017, pp. 25-27. Note that in its written submission, South Africa also presented the additional argument that it can be doubted whether the Security Council has the authority to waive the immunities of sitting Heads of State. Submission South Africa, para. 85. For further discussion and references on this matter, see sub-sections (i) and (ii) in part V(B) of this chapter.

Bashir's immunity was not waived by the Council,[187] and that Article 98(1) precluded the Court from requesting its states parties to arrest and surrender al-Bashir.[188]

For her part, the Prosecutor submitted that any consultations under Article 97 did not alter or suspend the 'pre-existing, clear, standing obligation to comply' with the arrest warrants for al-Bashir.[189] The Prosecutor claimed that South Africa had chosen to ignore this obligation,[190] and called upon the Chamber to refer the matter to the Security Council and the ASP.[191] On the question of immunity, the Prosecutor argued that the DRC decision was 'authoritative with regard to the issue at hand and did not need to be re-litigated'.[192] According to the Prosecutor, the Security Council's referral placed Sudan 'in a situation comparable to states parties'.[193] Because of Sudan's duty under the UN Charter to carry out decisions of the Security Council and the indirect application of Article 27(2) to Sudan, there would not

[187] In its submission South Africa presented detailed arguments as to why Resolution 1593 cannot be interpreted to include an implicit waiver. South Africa also contested the alternative Statute-based approach that was eventually adopted by the Chamber. In this respect, South Africa argued that 'if the Security Council made the Statute applicable to Sudan, that included article 98, and that article 27(2) applies only to immunity from the jurisdiction of the Court'. ICC South Africa decision (2017), paras. 34-37; Submission South Africa, paras. 81-99. For further discussion and references on this matter, see parts V(B) and V(C) in this chapter.

[188] ICC South Africa decision (2017), para. 32. Note that South Africa not only identified customary international law as the basis for al-Bashir's immunity, but also referred to the Host Agreement that was concluded between itself and the AU. See ICC South Africa decision (2017), para. 33. Submission South Africa, paras. 75-80.

[189] ICC South Africa decision (2017), para. 43; Public Court Records, 7 April 2017, p. 45, lines 18-20.

[190] ICC South Africa decision (2017), para. 42. Public Court Records, 7 April 2017, p. 43, lines 1-3.

[191] ICC South Africa decision (2017), para. 53; Submission Prosecutor, paras. 97-106.

[192] ICC South Africa decision (2017), para. 44. Public Court Records, 7 April 2017, p. 60, lines 8-13. On the question of immunity, see Submission Prosecutor, paras. 107-120; Public Court Records, pp. 50-78. Note that this was the very first opportunity for the Prosecutor to formally express her views on the obligation of states parties to arrest al-Bashir. In previous proceedings, the Chamber did not invite the Prosecutor to submit observations.

[193] Public Court Records, 7 April 2017, p. 71, lines 5-12. Cited by the Chamber in ICC South Africa decision (2017), para. 48. Note that while the Prosecutor called the DRC decision authoritative, she still proposed an alternative approach that was eventually also adopted by the Chamber.

be any 'conflicting obligation at the horizontal level between South Africa and Sudan'.[194] In short, the Prosecutor submitted that the DRC decision and Single Judge Tarfusser were right to conclude that al-Bashir does not enjoy immunity from arrest.

After the public hearing, Pre-Trial Chamber II, in which Presiding Judge Tarfusser was now joined by Judge Marc Perrin de Brichambaut and Judge Chango-ho Chung, took another three months before issuing its decision on the alleged non-compliance of South Africa. On 6 July 2017, the Chamber found that South Africa had failed to comply with its obligations under the Statute by not arresting al-Bashir, but that a referral to the ASP or the Security Council would not be appropriate in the present circumstances. How did the Chamber come to these conclusions?

On the question of immunity, the Chamber started out by making two preliminary observations. Firstly, the Chamber noted that under customary international law sitting Heads of State normally enjoy immunity from arrest by another state,[195] even when that arrest is sought on behalf of an international court like the ICC.[196] In this respect, the Chamber followed the DRC decision of PTC II in overturning the Malawi and Chad decisions of PTC I.[197] There would not be an exception under customary international law for the prosecution of international crimes by an international court like the ICC.

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[194] ICC South Africa decision (2017), paras. 49-50; Public Court Records, 7 April 2017, p. 71.

[195] Note that the Chamber did not discuss the question whether Article 27(2) reflects customary international law to the extent that immunities cannot bar an international court from exercising its jurisdiction for the prosecution of international crimes.

[196] ICC South Africa decision (2017), para. 68. Note that before turning to customary international law, the Chamber rejected South Africa's argument that al-Bashir also enjoyed immunity under the Host Agreement between South Africa and the AU. According to the Chamber, 'no provision of the Host Agreement appears to confer on al-Bashir any immunity from arrest', which would make 'it unnecessary to consider the issue of treaty-based immunity any further' (para. 67).

[197] The minority opinion of Judge de Brichambaut more or less agreed with the Chamber's conclusion on this point. His minority opinion includes a detailed analysis of state practice and a discussion on the nature of international courts (paras. 84-96). Based on this analysis, he concluded that 'it is not possible to determine, at this point in time, whether the scope of senior officials' immunity from arrest is restricted when the arresting state is acting in compliance with its obligations towards the Court or whether the rule of customary international law applies in the same manner in these circumstances as it would in the horizontal relationship between states'.

Secondly, the Chamber emphasized that this case did not revolve around the 'effect of any possible immunity … on the exercise *per se* by the Court of its jurisdiction'.[198] The Chamber pointed out that no dispute had arisen 'with respect to the general validity of the proceedings against al-Bashir'.[199] The 'only' question that the Chamber would have to answer is whether al-Bashir's immunity poses a procedural bar to the cooperation of states parties with his arrest.

In addressing this question, the Chamber first examined the scope of Article 27(2) and its relationship with Article 98(1). Like in the DRC decision, the Chamber concluded that Article 27(2) forms a permanent waiver for the immunities of states parties, and that a state party can never invoke immunities to refuse cooperation with the arrest and surrender of the sitting Head of State of a state party.[200] With respect to states that are not a party to the Statute, like Sudan, the Chamber acknowledged that the situation might be different. In the words of the Chamber, under Article 98(1) the Court 'may not, in principle, without first obtaining a waiver of immunity, request a state party to arrest and surrender the Head of State of a State not party to the Statute'.[201]

Next, the Chamber turned to the effect of the Security Council's Resolution in the case of al-Bashir. In the DRC decision, the Chamber had concluded that the text of Resolution 1593 (para. 2) showed that the Security Council 'implicitly waived [al-Bashir's] immunities under international

[198] *Ibid.*, para. 69.

[199] *Ibid.*

[200] The Chamber firmly rejected the argument made by South Africa that Article 27 does not have any effect on the rights and obligations of states vis-à-vis the Court, but concerns only the Court's jurisdiction. See ICC South Africa decision (2017), paras. 73-81. Note that the Chamber's conclusion on this point is the same as in the DRC decision, but that the underlying reasoning is different. For further discussion and references, see part II(B) of this chapter.

[201] *Ibid.*, para. 82.

law'.[202] This time, however, the majority of the Chamber adopted a different approach.[203] Instead of focussing on the interpretation of the Security Council's Resolution, the Chamber argued 'that the necessary effect' of the Security Council's referral is that, 'for the limited purpose of the situation in Darfur, Sudan has rights and duties analogous to those of states parties to the Statute'.[204] According to the majority of the Chamber, Article 27(2) 'applies equally with respect to Sudan', which would mean that the immunities of al-Bashir 'do not apply vis-à-vis states parties' and that Article 98(1) 'is not applicable' because there is no immunity to be waived.[205] In turn, states parties, including South Africa would have an obligation to arrest and surrender al-Bashir to the Court.[206]

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[202] ICC DRC decision, para. 29. Note that the Chamber (in the same composition as in the South Africa decision in 2017) had also adopted this approach in its decisions on al-Bashir's visits to Uganda and Djibouti in July 2016. *Al-Bashir* (ICC-02/05-01/09-266), Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, 11 July 2016; *Al-Bashir* (ICC-02/05-01/09-267), Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute, 11 July 2016.

[203] Judge de Brichambaut disagreed with the majority on this point. See Minority Opinion of Judge de Brichambaut, paras. 39-58. He concluded that 'the arguments of both the Prosecutor and South Africa contain a degree of validity' and that 'contrary to the position of the Majority' these arguments 'do not allow for a firm conclusion ... with regard to the question of whether or not Sudan is analogous to a state party' (para. 58).

[204] ICC South Africa decision (2017), para. 88. The Chamber did not provide a detailed explanation for its reasoning at this point. The Chamber acknowledged that the effect of the Security Council's referral amounts to 'an expansion of the applicability of an international treaty to a state which had not voluntarily accepted it as such', but that its decision in this respect 'is in line with the Charter of the United Nations, which permits the Security Council to impose obligations on states' (para. 89). In support, the Chamber referred, without further explanation, to the Namibia Opinion. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep 16, para. 116. For further discussion on the Namibia Opinion, see part V(B) in this chapter.

[205] ICC South Africa decision (2017), para. 91-93.

[206] *Ibid.*, para. 93.

The Chamber added that for this conclusion, 'it is immaterial … whether the Security Council intended - or even anticipated - that … al-Bashir's immunity as Head of State of Sudan would not operate to prevent his arrest'.[207] In contrast to the DRC decision, the Chamber noted that it did not see a 'waiver in the Security Council Resolution'.[208] However, 'no such waiver - whether "explicit" or "implicit" - would be necessary', according to the Chamber, because the effect of the Security Council's Resolution is that Article 27(2) applies to Sudan.[209]

Having established that South Africa was under a duty to arrest al-Bashir, the Chamber turned to the procedural scope of Article 98(1). At this point, the Chamber emphasized that Article 98(1) does not provide 'rights to states parties to refuse compliance with the Court's requests for cooperation'.[210] Even if there was a conflict of obligations in the meaning of Article 98, this 'could not have relieved South Africa of its duties vis-à-vis the Court'.[211] As to South Africa's concerns about the consultations under Article 97, the Chamber made a similar argument. The Chamber explained that no fundamental errors had been made and that South Africa had been given the opportunity to raise its problems.[212] Moreover, any consultations (whether requested or ongoing) between a state and the Court 'do not, as such suspend or otherwise affect the validity of the Court's request for cooperation'.[213] In other words, South Africa's interactions with the Court did not entitle South Africa to disregard the Court's request. South Africa had a duty to arrest al-Bashir and failed to comply with this obligation.[214]

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[207] *Ibid.*, para. 95.

[208] *Ibid.*, para. 96.

[209] *Ibid.*

[210] *Ibid.*, paras. 99-106.

[211] *Ibid.*, para. 106.

[212] The Chamber gave a detailed analysis of the scope of Article 97 in paras. 110-116, and on the interactions between South Africa and the Court in paras. 117-122.

[213] *Ibid.*, para. 119.

[214] Note that in an *obiter dictum* the Chamber also discussed the question whether the Genocide Convention (to which both South Africa and Sudan are parties) might affect al-Bashir's immunity from arrest (para. 109). In his Minority Opinion, Judge de Brichambaut argued, based on a detailed interpretation of Articles IV and VI of the Convention (paras. 4-37), that as a

The final question that the Chamber had to address was whether the present circumstances warranted a referral of the matter to the ASP and/or the Security Council.[215] Similar to the Nigeria decision, the Chamber concluded that this was not the case. In reference to the jurisprudence of the Appeals Chamber on this matter,[216] the Chamber stressed that 'an automatic referral … is not required as a matter of law', and that a Chamber has the discretion 'to consider all factors that may be relevant in the circumstances of the case'.[217] According to the Chamber two factors are particularly important in this case, namely (1) the manner in which South Africa approached its obligation and interacted with the Court, and (2) the issue of whether the involvement of the ASP and/or the Security Council would be an efficient way to obtain cooperation from South Africa.[218]

On the first factor, the Chamber made several observations, including that South Africa 'is the first state party to seek … a final legal determination on the extent of its obligations' to arrest al-Bashir.[219] With respect to the second factor, the Chamber noted the outcome of the domestic proceedings in South Africa and stated that it seems that South Africa has accepted its obligation to cooperate with the Court under its domestic legal framework.[220] Furthermore, the Chamber observed that the six previous referrals did not result in any measures against the respective states.[221] In light of these and

contracting party 'Sudan must be regarded to have relinquished the immunities of its 'constitutionally responsible rulers' when acceding to the Convention' (para. 38). In contrast, the majority concluded that the Genocide Convention does not include an 'implicit exclusion of immunities', *inter alia,* because the Convention 'does not mention immunities based on official capacity'. For further discussion on this matter, see the references in footnote 70 of this chapter.

[215] ICC South Africa decision (2017), paras. 124-137.

[216] *Kenyatta* (ICC-01/09-02/11-1032), Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute", 19 August 2015.

[217] ICC South Africa decision (2017), paras. 124-125.

[218] *Ibid.*, para. 125.

[219] *Ibid.*, paras. 127-134.

[220] *Ibid.*, para. 136.

[221] *Ibid.*, para. 138.

related considerations, the Chamber concluded that a referral would not be an appropriate measure in this case and that a formal finding of non-compliance would suffice.

In sum, in its decision on the non-cooperation of South Africa, PTC II came to the same conclusion as in the DRC decision, namely that Article 98(1) does not enable states parties to evade their obligation to arrest al-Bashir. Unlike the DRC decision, however, the Chamber did not refer the matter to the ASP and/or the Security Council. Moreover, the Chamber adopted a different reasoning on the question of immunity. The Chamber again turned to the Security Council, but where the DRC decision argued that the Security Council's resolution implicitly waived al-Bashir's immunity, the Chamber now rejected this interpretation. In the South Africa decision, the Chamber concluded that Article 98(1) does not apply because the Security Council's referral placed Sudan in a similar position as a state party.

V. Analysis of The Chamber's Turn to the Security Council

Al-Bashir's visit to South Africa has revived the debate among states and commentators about his immunity. The key issue in this debate is the Chamber's turn to the Security Council. In reaction to the DRC decision, several scholars, such as Erika de Wet and Nerina Boschiero, applauded the Court's judges for overturning the Chad and Malawi decisions. In their view, these earlier rulings failed to make any sense of Article 98(1), whereas the DRC decision offered a convincing explanation for why states parties cannot rely on this provision.[222] Other commentators, however, like Paola Gaeta, André de Hoogh and myself, were more critical about the Chamber's conclusion that the Council implicitly removed al-Bashir's immunity. We argued, *inter alia*, that the DRC decision wrongly assumed that the Council can remove immunities in an implicit manner and that the Chamber mistakenly conflated the obligation to waive immunities with their actual removal.[223]

[222] For references, see part V(B) in this chapter.

[223] *Ibid.*

The recent South Africa decision has given an additional dimension to this debate. In the South Africa decision, the Chamber also turned to the Security Council, but in a different way than in the DRC decision. According to the South Africa decision, the Council did not implicitly remove al-Bashir's immunity, but placed Sudan in a similar position as a state party. In adopting this reasoning, the Chamber followed a similar approach as Dapo Akande proposed in a journal article in 2009.[224] Like Akande, the Chamber concluded that the necessary effect of the Security Council's Resolution is that Article 27(2) applies with respect to Sudan, and that because of this al-Bashir's immunity does not apply vis-à-vis a state party like South Africa.

Both the DRC and the South Africa decision have raised a wide range of questions about the Security Council's relationship with the Court and about the effects of the Security Council's Resolution on al-Bashir's immunity. The following sections address these questions and analyse the Chamber's reasoning in the DRC and South Africa decisions. The purpose of this analysis is to assess the different approaches that the Court's judges have employed in their decisions and to weigh the arguments that scholars have advanced in support of these approaches.

A. Two Security Council avenues: UN Charter-based and ICC Statute-based

A first question that demands attention is why al-Bashir's immunity does not pose a procedural bar to the exercise of the Court's jurisdiction? In the DRC decision, the Chamber argued that 'when the exercise of jurisdiction by the Court entails the prosecution of a Head of State of a non-party, the question of personal immunities might validly arise', and could trigger the application of Article 98(1).[225] According to that Chamber, this provision does not apply in the case of al-Bashir, because the Council removed his immunities.[226] The Chamber did not separately discuss the two ways in which

[224] Akande, 'The Legal Nature of Security Council Referrals'. Support for Akande's approach has been expressed, *inter alia*, in Amnesty International, 'Bringing Power to Justice', p. 45; Daqun, 'ICC and Immunities', pp. 71-72; Kreβ, 'ICC and Immunities', pp. 241-242; Papillon, 'Has the Council Implicitly Removed Al Bashir's Immunity?', 281; Boschiero, 'The ICC Judicial Finding Against the DRC', 693.

[225] ICC DRC decision, para. 26.

[226] *Ibid.*, para. 29.

immunities can pose a procedural bar to the Court's proceedings. The Chamber answered the question why a state party cannot refuse cooperation with his arrest on the basis of Article 98(1), without explaining why the Court is permitted to exercise jurisdiction over al-Bashir in the first place.

Presumably, the Chamber's argument as to why Article 98(1) does not apply should be understood as part of the Chamber's explanation why immunities do not pose a procedural bar to the exercise of the Court's jurisdiction in the case of al-Bashir.[227] Indeed, this is what the Chamber suggested when it said that 'since immunities attached to Omar al-Bashir are a procedural bar from prosecution before the Court, the cooperation envisaged in [the Council's] Resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities'.[228] By speaking of a 'procedural bar from prosecution' and 'any impediment', the Chamber appeared to refer both to the exercise of jurisdiction and to cooperation with the Court. In other words, the Chamber seemed to assume that the Court is able to exercise jurisdiction over al-Bashir, *because* the Security Council removed his immunities.[229] The basis of the Court's ability to exercise jurisdiction would be the Resolution of the Council, and as such the UN Charter.

The South Africa decision took a different approach on the question of jurisdiction. After noting that the Court's jurisdiction was not contested in this case, the Chamber reasoned that the Security Council's Resolution triggered the Court's jurisdiction and bound Sudan to the Statute, including Article 27(2). Like Akande, the Chamber ruled that al-Bashir does not possess any immunity in relation to the ICC, and states parties are not able to invoke Article 98(1), because Sudan is 'indirectly' subject to Article 27(2).[230] Although Sudan's obligation to accept Article 27(2) would follow from the Council's

[227] In a similar vein, Jacobs has noted that 'while the reference to Article 98(1) is slightly confusing, because the Chamber was still discussing the application of Article 27(2) of the Statute, it is reasonable to assume that the [PTC] is claiming that the UNSC acting under Chapter VII, has removed al-Bashir's immunity as a bar to the exercise of jurisdiction by the Court'. Jacobs, 'The ICC's Approach to Immunities and Cooperation', pp. 289-291.

[228] ICC DRC decision, para. 29.

[229] *Ibid.*

[230] Akande, 'The Legal Nature of Security Council Referrals', 341.

decision, and thus from the Charter, the Court's ability to exercise jurisdiction over al-Bashir would derive from the Statute. States parties would not be able to invoke Article 98(1) because of the application of Article 27(2) and not because of the Council's Resolution under Chapter VII of the Charter. Instead of the '*Charter-based approach*' of the DRC decision, the South Africa decision asserted a '*Statute-based approach*'.

Both approaches are clearly different.[231] They both focus on the implications of the Council's referral for the immunity of al-Bashir, but do so on a separate legal basis. The Chamber's analysis in the DRC decision started with the powers of the Council under the Charter, whereas the South Africa decision argued that it is on the basis of the Statute that the Chamber should reject the claim that al-Bashir enjoys immunity from arrest. The distinction between the two approaches is an important one and both raise an entirely different set of follow-up questions.

B. Analysis of the Charter-based approach

In debating the DRC decision, several commentators have posed questions about the powers of the Security Council under the UN Charter to (implicitly) remove immunities, and about whether Resolution 1593 indeed removed al-Bashir's immunity. These questions target the Charter rather than the Statute-based approach. Indeed, as pointed out in the South Africa decision, if the Council's referral binds Sudan to Article 27(2), it does not matter whether the Council has the power to (implicitly) remove immunities under the Charter, because in that case al-Bashir's immunity is already removed by the application of the Statute.[232] However, if it is argued, as the Chamber did in the DRC decision, that al-Bashir's

[231] The difference between the Charter-based approach of the DRC decision and Akande's Statute-based approach has also been pointed out by: Gaeta, 'ICC Changes its Mind on Immunities Al-Bashir'; Jacobs, 'The ICC's Approach to Immunities and Cooperation', pp. 289-291; Ventura, 'Escape from Johannesburg?', 1013-1015 (noting that the High Court of South Africa in its ruling of 24 June 2015 took two different positions at the same time: on the one hand it followed Akande's Statute-based approach and on the other hand it adopted the Chamber's position that the Security Council has implicitly removed al-Bashir's immunity on the basis of the Charter).

[232] ICC South Africa decision (2017), para. 95.

immunity has been removed by virtue of the Council's powers under the Charter, then these questions are spot-on.

i. Does the Council have the power to deviate from customary international law?

A first question about the Charter-based approach is whether the Council is allowed to deviate from customary international law. The answer to this question depends on the interpretation that is given to Article 103 of the Charter, which provides that 'in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. The majority view in the academic discourse is that Article 103 covers customary international law and that the Council is, under certain conditions,[233] authorized to derogate from customary international law when acting under Chapter VII of the Charter.[234]

There are some scholars, however, who argue that the Council is bound to all existing rules of customary international law and is not allowed to derogate from any of these rules.[235] They claim that the drafters of the Charter made a deliberate choice to limit the application of Article 103 to 'international agreements', instead of 'all international obligations'. As the Council is bound to this provision, any directive of the Council that deviates from customary international law is in their view *ultra vires*. In the debate on al-Bashir's immunity, Asad Kiyani has argued, in a similar vein, that the

[233] As discussed later on in this part of the chapter (at ii), these conditions are subject to considerable debate.

[234] See generally Andreas Paulus and Johann Leiβ, 'Article 103', in Bruno Simma, Daniel-Erasmus Khan, George Nolte and Andreas Paulus (eds.), *The Charter of the United Nations - A Commentary* (Oxford: Oxford University Press, 2016, Third Edition), pp. 2132-2133; ILC Study Group chaired by Martii Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, A/CN.4/L.682, 13 April 2006, para. 345. In the literature on the case against al-Bashir, see, for example, de Wet, 'Implications of Al-Bashir's Visit to South Africa', 1060; Akande, 'The Legal Nature of Security Council Referrals', 348. In his minority opinion, Judge de Brichambaut acknowledged this prevailing view and continued his analysis on the assumption that the Council 'may deviate from both conventional and customary international law'. Minority Opinion of Judge de Brichambaut, para. 61.

[235] For example, the ILC Study Group refers to Nigel D. White and Ademola Abass, 'Countermeasures and Sanctions' in Malcolm D. Evans (ed.), *International Law* (Oxford: Oxford University Press, 2003), p. 518.

Council has violated the rules on the immunities of sitting Head of State by obliging Sudan to cooperate with the ICC.[236] Since Article 103 would prohibit the Council to act beyond customary international law, the Council would not be able to remove al-Bashir's immunity.[237]

However, most states and commentators agree that the Council is, under certain conditions, authorized to derogate from customary international law. Assuming that they are right, the Council has the power remove the immunities of a sitting Head of State under conventional and customary international law. In this sense, the first question about the Charter-based approach is not a very controversial one.

ii. Does the Council have the power to remove immunities 'implicitly'?

A second question about the Charter-based approach is whether the Council is allowed to use its presumed power to derogate from customary international law in an *implicit manner*. If the Council can remove immunities, can it do so without explicitly mentioning this derogation in its Resolution? With respect to the immunity of al-Bashir, some scholars have argued that it is doubtful whether the Council can implicitly remove immunities,[238] whereas others have claimed that a decision to this effect does not have to be explicit.[239]

One way to go about this is to seek a 'one-size-fits-all' answer to the question whether the Council has to explicate deviations from customary international law. In search for such a solution, Erika de Wet has argued that the practice of the Council shows that Chapter VII Resolutions specify 'what states may *not* do when deviating from international law with the Resolution', rather than explaining 'the extent to which states may deviate from international law under a [Council] Resolution' (emphasis added).[240] Based on this alleged practice of the Council, De Wet concluded that 'it is correct to assume

[236] Kiyani, 'Al-Bashir and the ICC', 478-481.

[237] *Ibid.,* 481.

[238] Tladi, 'Duty South Africa to Arrest al-Bashir', 1043; Jacobs, 'The ICC's Approach to Immunities and Cooperation', p. 295; De Hoogh and Knottnerus, 'ICC Issues New Decision on al-Bashir's Immunities'.

[239] Kreβ, 'ICC and Immunities', p. 241; De Wet, 'Implications of Al-Bashir's Visit to South Africa', 1061.

[240] De Wet, 'Implications of Al-Bashir's Visit to South Africa', 1061.

that there is no requirement under international law in accordance with which the [Council] has to spell out the obligation to lift immunities'.[241]

Another, and in my opinion more sophisticated way to answer this question, is to examine what the specific rules of customary international law have to say about possible derogations. While in many cases rules of customary international law may not give any clues about the procedure and form of derogation, the international law of immunities gives quite clear directions on how states and (presumably) international organisations can deviate from these rules. As to the form of a waiver of immunity by a state, the third report of the first Special Rapporteur to the ILC on immunity of state officials from foreign criminal jurisdiction specifically provides that 'the waiver of immunity of a serving Head of State … must be express'.[242] The underlying logic that the report invokes is that there should not be any doubts about 'the real intent' of the state concerned to waive the immunity of its Head of State.[243] Arguably, the same logic applies with respect to an imposed waiver, where an international organization (*i.e.*, the Security Council) removes the immunities of a state.[244] The nature of immunities, as vested in the state, seems to require that any derogation from these rules is made explicitly.[245]

If the ILC is right and this is indeed the prevailing rule under customary international law, then the next question to be asked is whether the Council is somehow bound to this rule. The answer to this question depends in turn on one's position in the much broader debate on the limits of the Council's enforcement powers.[246] On one view, the Council is not bound to existing rules on how to remove

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[241] *Ibid.* Note that de Wet does not speak of an actual removal of immunities (like the DRC decision), but of an obligation to lift immunities.

[242] ILC Special Rapporteur Kolodkin, Third report, para. 61(l).

[243] *Ibid.*

[244] Under this logic, an obligation to waive does not have to be explicit. This obligation can follow from a more general obligation to cooperate with, for example, the ICC. However, the actual waiver itself has to be explicit. For as long as a state has not acted upon its obligation, there cannot exist a waiver, but only a failure of a state to fulfil its obligation to waive.

[245] De Hoogh and Knottnerus, 'ICC Issues New Decision on al-Bashir's Immunities'.

[246] It should be highlighted here that there is no consensus on the limits of the Council's authority under Chapter VII. Commentators have contested when and in what form the Council is allowed to derogate from international law. What is beyond

immunities. This view is based on the idea that the Council is allowed to deviate from all rules of customary international when it acts under Chapter VII.[247] Many scholars have argued, however, that when the Council is involved with (quasi-)adjudication or legislation, the legal flexibility of the Council decreases to the extent that the Council becomes bound to the 'applicable' rules of customary international law through Article 1(1) of the Charter.[248] Based on this reasoning, it may be contended that by referring a situation to the Court, and by specifying the legal obligations of non-parties, the Council engages in a form of legislation that constitutes the basis of future adjudication by the ICC.[249]

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dispute is that the Council's discretion under Chapter VII is not unbound by law (*legibus solutus*), and that under the principle of attribution of powers the Council only possesses those powers that have been conferred expressly or implicitly by the Charter. This means that the Council is at least bound to stay within its competencies under Chapter VII (as defined in Articles 39-42). However, what this exactly requires and whether the Council is also restricted by other rules of international law remains subject to considerable debate. See generally Anne Peters, 'Article 25', in Bruno Simma, Daniel-Erasmus Khan, George Nolte and Andreas Paulus (eds.), *The Charter of the United Nations - A Commentary* (Oxford: Oxford University Press, 2016, Third Edition), pp. 809-819.

[247] Several scholars have argued that the drafters of the Charter gave the Council an 'implicit allowance' to deviate from international law for decisions that are adopted in accordance with the requirements of Chapter VII. While recognizing that Article 24(2) obliges the Council to act in accordance with the 'Purposes and Principles' of the UN as defined in Articles 1 and 2 of the Charter, they have professed that these purposes and principles establish 'guidelines rather than concrete limits', and that Article 1(1) excludes the collective measures of Chapter VII from the general obligation for the UN to act in conformity with 'the principles of justice and international law'. Consequently, the Council would not be bound by any rules of international law, except for the requirements of Chapter VII and rules of *jus cogens*. See Nico Krisch, 'Introduction to Chapter VII: The General Framework', in Bruno Simma, Daniel-Erasmus Khan, George Nolte and Andreas Paulus (eds.), *The Charter of the United Nations - A Commentary* (Oxford: Oxford University Press, 2016, Third Edition), pp. 1256-1257.

[248] In a general sense, these scholars contend that the degree of legal flexibility decreases when the Council imposes long-term obligations that are not directly related to the initial emergency situation. In this logic, Article 1(1) only exempts the Council from the general obligation of the UN to observe rules of international law outside the Charter when the Council fulfils the 'classical police function'. When the Council is involved with (quasi-)adjudication, legislation or administration, the Council would be bound by the applicable rules of customary international law and general principles of international law through Article 1(1). See Krisch, 'Introduction to Chapter VII', p. 1257.

[249] Abel S. Knottnerus, 'The Security Council and the International Criminal Court: The Unsolved Puzzle of Article 16' (2014) 61 *Netherlands International Law Review* 206-207.

In doing so, the Council is arguably bound to respect certain rules of customary international law through Article 1(1), including the rule that a removal of immunities has to be conveyed in an explicit manner.

iii. Has the Council removed al-Bashir's immunity?

A third question about the Chamber's Charter-based approach is whether there is sufficient 'evidence' to prove that the Council has removed al-Bashir's immunity in Resolution 1593. Assuming that the Council has the power to remove immunities and that the Court is able to interpret the Council's Resolution,[250] can it be concluded that the Council did indeed remove al-Bashir's immunity?[251]

As a starting point, it should be recalled that this question is irrelevant for the analysis of the Statute-based approach, because under this approach the removal of al-Bashir's immunity follows from the application of the Statute, and not from the Resolution. In line with the Charter-based approach, however, the Chamber did examine the text of Resolution 1593 in the DRC decision. The Court's judges concluded that the Resolution was meant to eliminate any impediments to the proceedings before the Court, including the lifting of immunities, because 'any other interpretation would render the [Council's] decision requiring that Sudan "cooperate fully" … senseless'.[252]

Some scholars, who generally agree with the Chamber's reasoning in the DRC decision, have argued that by referring to full cooperation, the Council made 'a textual link' to Article 27(2) and Article 98(1).[253] Other commentators, however, have challenged the Chamber's claim that the only way to make

[250] The power of the Court to interpret Security Council Resolution follows from the doctrine of *compétence de la compétence*, which is expressed in Article 119(1) of the Statute: 'any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court'. See also Minority Opinion of Judge de Brichambaut, paras. 62-63.

[251] Note that in its submission to the Chamber, South Africa argued that 'each and every one of [the relevant] elements [for the interpretation of Resolution 1593] … supports the interpretation that the immunities of Mr. Al-Bashir have not been affected by UN Security Council Resolution 1593'. Public Court Records, 7 April 2017, p. 28.

[252] ICC DRC decision, para. 29.

[253] Boschiero, 'The ICC Judicial Finding Against the DRC', 644-645; Ventura, 'Escape from Johannesburg?', 1017-1022; De Wet, 'Implications of Al-Bashir's Visit to South Africa', 1061. See also the views of the Prosecutor on this matter in Public Court Hearing, 7 April 2017, pp. 64-68; and the Minority Opinion of Judge de Brichambaut, paras. 68-83. In quoting de Wet, the Minority Opinion reasoned that 'an explicit removal of the immunities of Omar al-Bashir was not required, since "the

sense of the cooperation requirement is to interpret this requirement as an implicit removal of all immunities.[254] They have pointed out that Sudan's obligation to cooperate with the Court is not deprived of all meaning if its Head of State continues to enjoy immunity from arrest. After all, Sudan would still have to cooperate with the Court in all other aspects of its investigation in Darfur, and the Court would still be able to exercise jurisdiction against other Sudanese nationals that do not enjoy immunities as contemplated in Article 98(1).

A second and more fundamental objection against the Chamber's interpretation of Resolution 1593 is that the Chamber wrongly equated Sudan's obligation to cooperate with an actual removal of immunities by the Council.[255] Conceptually speaking, there is an important difference between an obligation to waive (*i.e.*, an obliged waiver) and a removal of immunities (*i.e.*, an imposed waiver).[256] A state may have an obligation to waive immunities, but the concept of obligation under international law implies that a state can fail to fulfil this obligation, which means that the immunities concerned continue to exist. In contrast, if a third actor (such as the Security Council) removes the immunities of a state, it imposes a waiver upon that state and the immunities concerned cease to exist.

In light of this conceptual distinction between an obliged and an imposed waiver, I have suggested elsewhere, together with André De Hoogh, that the Council may have obliged Sudan to waive al-Bashir's immunity, but that Sudan's requirement to fully cooperate with the Court does not mean, in

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reference to 'full cooperation' in Resolution 1593 should be taken to denote all required measures under domestic and international law, including lifting immunities" '. Nonetheless, Judge de Brichambaut concluded on the basis of other factors, including context (paras. 69-72), object and purpose (paras. 73-75), statements by members of the Council (paras. 76-78), other Security Council Resolutions (para. 79) and subsequent practice of UN organs and affected states (paras. 80-82) that 'the current state of the law does not allow a definite answer to be reached in relation to the question of whether this resolution removes the immunities of Omar Al-Bashir' (para. 83).

[254] De Hoogh and Knottnerus, 'ICC Issues New Decision on al-Bashir's Immunities'; Jacobs, 'The ICC's Approach to Immunities and Cooperation', p. 295; Tladi, 'Duty South Africa to Arrest al-Bashir', 1043.

[255] See for example De Hoogh and Knottnerus, 'ICC Issues New Decision on al-Bashir's Immunities'; Tladi, 'Duty South Africa to Arrest al-Bashir', 1043.

[256] See above, part I.

and of itself, that his immunity is removed.[257] In the logic of an obliged waiver, Sudan has failed to fulfil its obligation under the Charter to waive al-Bashir's immunity, which means that this immunity continues to apply.

Admittedly, this interpretation of the cooperation requirement in Resolution 1593 as an obliged rather than an imposed waiver is based on the assumption that the Council can only remove immunities in an explicit manner.[258] If it is assumed, however, that the Council has the power to implicitly remove immunities, then it might be sufficient to establish some sort of textual link or implied intent in the Resolution to establish the existence of this imposed waiver. This textual link or implied intent would then have to be established on the basis of all the relevant factors, including ordinary meaning, context, the object and purpose of the resolution, the statements of members of the Council made at the time of its adoption, other Security Council resolutions and/or the subsequent practice of UN organs and affected states.[259]

[257] De Hoogh and Knottnerus, 'ICC Issues New Decision on al-Bashir's Immunities'. See also Gaeta, 'ICC Changes its Mind on Immunities Al-Bashir'.

[258] The text of paragraph 2 of Resolution 1593 is clear in the sense that it does not include an explicit imposed waiver. See also Minority Opinion of Judge de Brichambaut, paras. 66-68.

[259] As stated by the ICJ: 'While the rules on treaty interpretation embodied in Articles 31 and 32 of the [VCLT] may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the UN Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States [reference to the Namibia Opinion, para. 116], irrespective of whether they played any part in their formulation. The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions'. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] ICJ Rep 403, para. 49. See also Minority Opinion of Judge de Brichambaut, paras. 64-65.

Yet, even if the Council were to possess the power to implicitly remove immunities, then the question remains whether there is sufficient evidence for such a removal in Resolution 1593. Why should the cooperation requirement for Sudan not be interpreted as creating an obligation for Sudan to waive al-Bashir's immunity? For its part, the DRC decision does not provide an answer to this question. As said, the Chamber simply stated, without further explanation of the relevant factors, that paragraph 2 of Resolution 1593 was meant to eliminate any impediments to the proceedings before the Court, because any other interpretation would render the cooperation requirement 'senseless'.[260]

When actually looking at the relevant factors, in doing what the Chamber failed to do, it can be argued that an interpretation of the ordinary meaning of paragraph 2, indicates that the Council did not remove the immunities of Sudanese officials.[261] A first indication is that the text omits an explicit reference to that effect.[262] In light of the contested nature of the international law of immunities in general, and the immunities of sitting Heads of State in particular, the Council may have been expected to express itself explicitly on this matter.[263] This holds true regardless of whether the Council has the power to implicitly remove immunities.[264]

[260] ICC DRC decision, para. 29.

[261] Paragraph 2 of Resolution 1593 'Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;'.

[262] See also Lentner, 'Why the ICC won't get it right' (arguing, *inter alia*, that because paragraph 2 omits a reference to the Rome Statute and only requires Sudan to cooperate 'pursuant to this Resolution', the cooperation requirement cannot be interpreted to include an implicit removal of immunities).

[263] Jacobs, 'The ICC's Approach to Immunities and Cooperation', p. 295. *Contra* de Wet, 'Implications of Al-Bashir's Visit to South Africa', p. 1061; Minority Opinion of Judge de Brichambaut, p. 67.

[264] With respect to the Council's 'vague' language in Resolution 1593, Manuel Ventura has offered an intriguing analysis of the alleged removal of al-Bashir's immunity by the Council in light of the majority opinion of the ECtHR in *Al-Jedda*. In this case, the European Court concluded that 'it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law'. *Al-Jedda v. United Kingdom* (Appl.No.27071/08), Grand Chamber of the ECtHR, 7 July 2011, para. 102. The

The same argument can also be used against an interpretation of the cooperation requirement as creating an obligation to waive. Indeed, the Council may have been expected to explicate the obligation to waive the immunities of Sudanese officials. However, the ordinary meaning of the terms 'cooperate fully', as creating obligations for Sudan under the Charter to cooperate with the Court, is easier to reconcile with the idea of an obligation to waive than with an imposed removal of immunities. If the Court were to request Sudan to waive its immunities, then Sudan would be bound to cooperate with this request under paragraph 2 of Resolution 1593 (and as such under the Charter). This fits the logic of the cooperation requirement as creating obligations for Sudan to fully cooperate with the Court.

The idea of a removal of immunities, on the other hand, has an entirely different logic. A removal of immunities does not create an obligation for Sudan to cooperate with the Court, because Sudan would not have to do anything about the immunities of its officials since these immunities would no longer exist as a result of the removal. The ordinary meaning of the terms 'cooperate fully', as creating obligations for Sudan under the Charter, thus speaks against an interpretation of paragraph 2 as an implicit removal of immunities. A removal simply does not fit the logic of an obligation to cooperate, because it leaves no room 'to cooperate'.

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underlying principle espoused in the judgment could, according to Ventura, lead some to conclude that the language in resolution 1593 is too 'vague' or 'unclear' to remove al-Bashir's immunity as Head of State. Against this hypothetical conclusion, Ventura offered, *inter alia*, two arguments: (A) it would be 'unrealistic to expect the UN Security Council to spell out in detail and address, in advance, all of the intricacies and legal issues that could potentially arise out of a referral'; and (B) 'singling out of … Sudanese states officials … could also be seen as an infringement on the ICC's judicial independence'. For these and related reasons, Ventura sided with Akande's 'more nuanced' position' that the referral 'meant that the provisions of the Rome Statute as a whole were intended to apply to Sudan (including Article 27) as if it were a state party. In my view, Ventura's concerns about applying the alleged principle of *Al-Jedda* are, in principle, valid. However, they do not take away the other problems that this chapter identifies about the Charter- and Statute-based approach. With regard to the Charter-based approach, Ventura's arguments do not give any reason for why the cooperation requirement should not be interpreted as an obligation to waive rather than as an imposed waiver. Furthermore, with respect to the Statute-approach, Ventura's rejection of *Al-Jedda* does not resolve the problems highlighted below in part V(C) and especially do not explain why Sudan should be treated as a state party under the Statute.

Apart from ordinary meaning, the other relevant factors do not give a clear indication as to the question whether the reference to 'cooperate fully' entails an obligation to waive or constitutes a removal of immunities. Firstly, the context of the Resolution,[265] as well as its object and purpose[266] can be interpreted in conflicting ways. As part of the context of the Resolution reference can be made to the Preamble of the Resolution which mentions the report of the International Commission of Inquiry in Darfur. This report provided that the crimes identified by the Commission implicated the responsibilities of senior government officials, which in turn suggests that the Council was aware of the possibility that immunities could pose a procedural bar to the exercise of the Court's jurisdiction. Assuming that the Council acted upon this knowledge, Sudan's obligation to 'cooperate fully' could perhaps be interpreted as an implicit removal of immunities.

However, another 'particular contextual element' speaks against this interpretation.[267] At the time of the adoption of the Resolution no warrants of arrest had been issued by the Court. As argued by Judge de Brichambaut, this means that it was not certain that persons enjoying immunities under international law would be prosecuted by the Court.[268] The Council did not have to address the question of immunities in the Resolution, so the reference in the Report of the Commission to persons that enjoy

[265] For a detailed discussion on the relevant contextual elements and especially the reference in the Preamble of the Resolution to the report of the International Commission of Inquiry in Darfur (which referred to the fact that the crimes identified by the Commission implicated the responsibilities of senior government officials), see Minority Opinion of Judge de Brichambaut, paras. 69-72. The Minority Opinion concluded that context suggested that 'the reference to 'cooperate fully' [in Resolution 1593] was not necessarily connected to the issue of immunities', most importantly because 'at the time of adoption of UN Security Council Resolution 1593 no warrants of arrest had been issued by the Court'.

[266] This factor does also 'not provide a clear indication as the intention of the [Council] on the removal of immunities', especially because the Resolution does not 'exclusively concern a referral … but envisages other measures to address the alleged crimes committed in Darfur'. As concluded by the Minority Opinion of Judge de Brichambaut, paras. 73-75. *Contra* Lentner, 'Why the ICC won't get it right' (arguing that a teleological interpretation of the Resolution shows that it did not remove immunities because immunities concern 'the core functioning of the Security Council, namely the peaceful relations between states and stable international relations', and an actual arrest of al-Bashir could disturb these relations).

[267] Minority Opinion of Judge de Brichambaut, para. 72.

[268] *Ibid.*

such immunities does not necessarily support the view that Resolution 1593 entails an implicit removal of immunities.

Another relevant contextual factor is paragraph 6 of the Resolution which refers to existing agreements under Article 98(2) of the Statute by excluding 'nationals, current or former officials or personnel' of non-parties from the Court's jurisdiction for acts committed while participating in operations 'established or authorized' by the Council.[269] In this paragraph, the Council specified that the Court would not have jurisdiction over a certain group of individuals, but did not mention Sudanese officials like al-Bashir. By setting limits to the Court's jurisdiction and implicitly referring to Article 98(2), paragraph 6 suggests that the Council explicitly set out all limitations to the Court's jurisdiction and all implications of Article 98. By not mentioning the immunities of Sudanese state officials, paragraph 6 could indicate that Sudan's obligation to cooperate fully with the Court encompasses a removal of all immunities that are normally covered by Article 98(1).

However, the direct context of Sudan's cooperation requirement in paragraph 2 speaks against this interpretation.[270] Directly after imposing an obligation on the government of Sudan, in fact in the same paragraph, the Council '… while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully'. If the imposition of the obligation to cooperate on Sudan had implicitly removed all immunities that could pose a procedural bar to cooperation within the meaning of Article 98(1), then the Council could have used stronger language than 'urges' for states parties. The obligation to respect the immunities of Sudan applies to other states, rather than to Sudan itself. As such, the

[269] Article 98(2) of the Statute provides that 'The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender'. Note that Paragraph 6 was included in Resolution 1593 under the pressure of the United States as a follow-up to Security Council Resolutions 1422 and 1487. For further discussion and references on these 'disguised deferrals', see chapter 2, part I(B).

[270] De Hoogh and Knottnerus, 'ICC Issues New Decision on al-Bashir's Immunities'.

Council could have been expected to address an obligation to other states not to respect the immunities of Sudan. Instead the Council noted that non-parties had no obligation to cooperate and only urged them, as well as the Court's states parties, to cooperate. The fact that the Resolution merely urges states, including states parties, to cooperate fully with the Court suggests that the Council did not intend to change the obligations of these states with respect to the immunities of Sudan. In other words, the direct context of Sudan's obligation to cooperate fully with the Court supports the exact opposite conclusion of paragraph 6, namely that the Resolution does not include an implicit removal of Sudan's immunities.

In addition to these different contextual elements, the statements made by members of the Council at the time of its adoption, and other Resolutions of the Council on Sudan in particular or on the prosecution of international crimes more generally do not give information about the intentions of Council. The members of the Council did not make any reference to immunities in relation to Sudan at the time of the adoption of Resolution 1593, [271] and the Council did not address this issue in any other Resolution.[272]

Finally, the subsequent practice of UN organs and affected states does not provide a clear indication either.[273] On subsequent practice of the Council, it can, for example, be noted that the Council

[271] See UNSC, S/PV.5118, 31 March 2005. For further discussion see De Hoogh and Knottnerus, 'ICC Issues New Decision on al-Bashir's Immunities'; Minority Opinion of Judge de Brichambaut, paras. 76-78. Note that in contrast to the aforementioned ruling of the ICJ, Judge de Brichambaut also considered statements made in later meetings of the Council. In my opinion, these statements should only be considered, if applicable, as subsequent practice of affected states.

[272] Note that in Resolution 1970, referring the situation in Libya to the Prosecution, the Council stated in nearly identical terms 'that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution'. For further discussion see Minority Opinion of Judge de Brichambaut, para. 79.

[273] The subsequent practice on this matter is not uniform. See Tladi, 'Duty South Africa to Arrest al-Bashir', 1043 (emphasizing that the Council has missed many opportunities in which it could have confirmed its alleged intention to waive the immunities of Sudanese officials); Minority Opinion of Judge de Brichambaut, paras. 80-82. *Contra* Boschiero, 'The ICC Judicial Finding Against the DRC', 651 (highlighting, *inter alia*, the Council's refusal of the AU's deferral request for al-Bashir as relevant subsequent practice); Ventura, 'Escape From Johannesburg?', 1021-1022 (arguing that the behaviour of the Council on this matter 'is not at all what one would expect were it to believe that President al-Bashir is entitled to Head of State immunity', and concluding that 'sometimes, silence speaks louder than words and … can be of interpretative assistance').

did not react on the non-cooperation decisions of the Court concerning al-Bashir's visits to African states parties, which could suggest that the Council did not intend to remove al-Bashir's immunities. However, the Council also did not act on the AU's deferral requests under Article 16 which were, in part, based on the AU's position that sitting Heads of State enjoy immunities under international law.

Throwing all these different factors into the crucible, the only convincing conclusion is that there is not sufficient evidence to prove that the cooperation requirement removed the immunities of Sudanese officials, including al-Bashir. None of the relevant factors speaks conclusively in favour of such an interpretation of Resolution 1593. In my opinion, even if the Council would have the power to remove immunities in an implicit manner, which I question, then the more convincing interpretation remains that the Resolution created an obligation for Sudan to arrest al-Bashir and to waive this immunity when this is requested by the Court. This interpretation fits best with the ordinary meaning of Sudan's obligation to 'cooperate fully' with the Court and takes into account that the Council did not (have to) discuss the question of the immunities of Sudan's state officials at the time when the Resolution was adopted.

iv. An imposed or an obliged waiver: what are the consequences for Article 98(1)?

If it is assumed, for the sake of argument, that the Council has either removed al-Bashir's immunity or has obliged Sudan to waive these immunities, a final question about the Charter-based approach, is what this means for the application of Article 98(1). If Resolution 1593 entails either an imposed or an obliged waiver, does this mean that states parties can no longer invoke Article 98(1) to refuse cooperation with the arrest of al-Bashir?

As to the first possibility, if the Council removed al-Bashir's immunity (an imposed waiver), and was authorized to do so in an implicit manner, it makes sense that this immunity ceases to exist. This is also the underlying logic of the DRC decision. The Chamber stated that 'the "cooperation of that third State [Sudan] for the waiver of the immunity", as required under the last sentence of article 98(1) [would be] ensured by the language [of the Council]'. If the Chamber is right and Resolution 1593 provides an imposed waiver of al-Bashir's immunity, then Article 98(1) does not apply, because there are no longer any immunities that preclude the arrest of a Sudanese official.

However, the legal situation is more complex if the Council 'only' created an obligation for Sudan to waive al-Bashir's immunity (an obliged waiver). In that case, it seems that his immunity continues to exist for as long as Sudan has not acted upon its obligation under the Charter to waive this immunity.[274] Consequently, al-Bashir's immunity would still pose a procedural bar to cooperation with the Court and Article 98(1) would apply.

In contrast to this assessment of the legal consequences of an obliged waiver, Erika de Wet has argued that even if the Council only created an obligation to waive al-Bashir's immunity, Article 98(1) does not apply because 'the Chapter VII character' of this obligation would require 'all UN member states to regard his immunity as having been waived'.[275] Her argument is based on the Namibia advisory opinion of the ICJ, which concerned a Resolution of the Council that declared the presence of South Africa in Namibia illegal, without imposing any explicit obligations on other states.[276] In this advisory opinion, the ICJ gave a purposive interpretation to the Resolution and determined that it required all states to recognize South Africa's presence as illegal. More generally, the ICJ professed that all states have to accept the legal situation resulting from a decision of the Council under Article 25, because anything less would 'deprive this principal organ of its essential functions and powers under the Charter'.[277]According to de Wet, the same reasoning applies in the case of al-Bashir. All UN member states would be required to regard al-Bashir's immunity as having been waived and no state party would be able to refuse cooperation on the basis of Article 98(1).

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[274] De Hoogh and Knottnerus, 'ICC Issues New Decision on al-Bashir's Immunities'; Gaeta, 'ICC Changes its Mind on Immunities Al-Bashir'; Blommestijn and Ryngaert, 'Exploring the Obligations for States to Act upon the ICC's Arrest Warrant', 440.

[275] De Wet, 'Implications of Al-Bashir's Visit to South Africa', 1062.

[276] *Ibid.* referring to Akande, 'The Legal Nature of Security Council Referrals', 347. He discussed the Namibia Advisory Opinion with regard to the right of non-parties to arrest al-Bashir. Note, however, that Akande took a different position than de Wet on the question of al-Bashir's immunity, as he argued that Article 98(1) does not apply because Sudan is bound to Article 27(2). He reasoned, based on the Namibia Opinion, that all states (including non-parties) are entitled to rely on the fact that Sudan is bound to Article 27(2) and thus have a right to arrest the Sudanese President.

[277] ICJ Namibia Opinion, paras. 114-116.

This line of argumentation is more sophisticated than the Chamber's reasoning in the DRC decision, which does not refer to the Namibia opinion at this point.[278] In my opinion, however, de Wet failed to address two problems. First of all, she did not explain why the ICJ's reasoning in the Namibia advisory opinion applies *ipso facto* to Resolution 1593. Indeed, the ICJ ruled in the Namibia opinion that when the Council adopts a binding decision under Article 25, its member states have 'to comply with that decision'.[279] The ICJ added to this, however, that 'the precise determination of the acts permitted or allowed - what measures are available and practicable, which of them should be selected, what scope they should be given and by whom they should be applied - is a matter which lies within the competence of the appropriate political organs of the [UN]'.[280] In other words, the ICJ foresaw limits to the legal rights and responsibilities that can be derived from the general obligation to comply with decisions of the Council.[281]

With respect to the case of al-Bashir, the Council's decision obliges Sudan to cooperate with the Court and this probably includes an obligation for Sudan to waive al-Bashir's immunity. In the logic of the Namibia opinion, UN member states have an obligation under Article 25 of the Charter to recognize Sudan's obligations and are presumably under an obligation not to lend Sudan 'any support or any form of assistance' in violating these obligations. Yet, these general obligations do not necessarily mean that states are bound under the Charter to consider al-Bashir's immunity as having been waived. This is a more specific measure. As foreshadowed in the Namibia opinion, it is for the Council to decide

[278] Note that the Chamber did refer to the Namibia Opinion when discussing the alleged conflict of obligations between the ICC and the AU. See ICC DRC decision, para. 30.

[279] ICJ Namibia Opinion, para. 116.

[280] *Ibid.*, para. 120.

[281] Note that the Namibia situation was also different in that the Council had declared the administration of South Africa over Namibia to be illegal. The Council's referral does not, as such, imply a determination of illegality *per se* (even if the ICC were to determine that crimes have been committed in Darfur).

whether this measure is advisable. This is something that the Council has not done in Resolution 1593, or in response to the Chamber's decisions on the non-cooperation of African states parties.[282]

Secondly, and more to the point, if de Wet is right, and the Council has indeed created an obligation for all UN member states (including states that are not a party to the Rome Statute)[283] to regard al-Bashir's immunity as having been waived, then the question remains whether the ICC is in a position to hold this obligation against a state party that refuses to cooperate with the arrest of al-Bashir. On this question, several scholars have noted that Sudan's obligation under the UN Charter to cooperate with the Court and to waive al-Bashir's immunity does not somehow 'modify the powers and competence of the Court, including the powers of the Court vis-à-vis member states in the matter of judicial cooperation'.[284] The Council's decision to oblige Sudan to cooperate with the ICC (and, arguably, to oblige all UN member states to consider al-Bashir's immunity as being waived) does not relieve the Court from its obligation to implement Article 98(1). The question for the Court is still whether a state party would somehow act inconsistently with its 'obligations under international law with respect to the state or diplomatic immunity of a person', when it would have to arrest al-Bashir.

According to de Wet, Article 98(1) does not apply when all UN member states would be obliged to regard al-Bashir's immunity as having been waived, because this obligation would 'imply that the immunity obstacle posed by Article 98 … has been removed'.[285] She did not explain, however, why this

[282] Another factor to consider in this regard is that the Council may be bound to rules of customary international law that require an imposed waiver to be explicit. If states are under an obligation to act as if al-Bashir's immunity is waived, as argued by de Wet, then the Council does not just create an obligation to waive, but essentially eliminates his immunities for all ICC-related purposes.

[283] Note that both de Wet and Akande have argued that non-parties would be permitted to arrest al-Bashir, but they would not have an obligation to do so 'as they are not party to the ICC Statute and therefore not bound to give effect to its part on state cooperation'. See de Wet, 'Implications of Al-Bashir's Visit to South Africa', 1062-1063, fn. 83; Akande, 'The Legal Nature of Security Council Referrals', 347-348.

[284] Gaeta, 'ICC Changes its Mind on Immunities al-Bashir'; Jacobs, 'The ICC's Approach to Immunities and Cooperation', pp. 290-291.

[285] De Wet, 'Implications of Al-Bashir's Visit to South Africa', 1062.

would be the case. In a general sense, it may be accepted that the alleged obligation of UN member states to consider al-Bashir's immunity as being waived trumps other legal obligations by virtue of Article 103 of the Charter. However, 'priority of UN Charter obligations does not mean that the other obligation disappears or that the state who would be compelled to give priority to the Charter obligations would still not face responsibility under international law for not respecting the other obligation'.[286] For as long as Sudan has not waived al-Bashir's immunity, a state party would act 'inconsistently with its obligations under international law' to respect this immunity when it would arrest the Sudanese President.[287] Article 98(1) would apply, even if a state party has to give priority to its obligations under the Charter. As De Hoogh and I have argued elsewhere,[288] the ICC is not allowed to ignore that al-Bashir's immunity has not been waived by Sudan, even if all UN member states would have an obligation to consider his immunity as being waived, because the Court is not the addressee of the Council's decision and cannot assume its powers under Chapter VII of the Charter.[289]

In sum, de Wet has argued that Article 98(1) does not apply because Sudan has an obligation to waive al-Bashir's immunity and all UN member states have an obligation to regard his immunity as having been waived (an obliged waiver). The Chamber's reasoning in the DRC decision started from a different assumption, namely that the Council implicitly removed al-Bashir's immunity and that Article 98(1) does not apply because this immunity would not exist anymore (an imposed waiver). Both variants

[286] Jacobs, 'The ICC's Approach to Immunities and Cooperation', p. 300.

[287] This probably also holds true for the obligation of AU member states under the AU Constitutive Act not to cooperate with the Court on the arrest and surrender of al-Bashir. It is questionable, however, whether this obligation falls within the scope of Article 98(1), which is limited 'to obligations under international law with respect to the state or diplomatic immunity of a person'. While the obligation under the AU Constitutive Act is an obligation under international law, this obligation does not directly concern the immunity of al-Bashir, as it refers to existing obligations in this respect.

[288] De Hoogh and Knottnerus, 'ICC Issues New Decision on al-Bashir's Immunities'.

[289] One other possibility is that the Statute has left a *lacuna* when it comes to the application of Article 98(1) to a non-party like Sudan that is obliged by the Council to cooperate fully with the ICC. If such a gap exists, the Court might be able under Article 21(1)(b) to apply the Charter and relevant Council resolutions. However, it is doubtful that this would enable the ICC to invoke Article 103 of the Charter, as this falls beyond the scope of the presumed gap.

of the Charter-based approach prompt difficult questions about the legal powers of the Court, the interpretation of Resolution 1593 and the ability of the Court to act on the basis of the Council's powers under Chapter VII. In my opinion, these questions have not been resolved by the DRC decision or by supporting commentators in a convincing manner. Firstly, it remains questionable whether the Council is able to remove immunities in an implicit manner. Secondly, and more to the point, I remain unconvinced that the Court is in a position to hold the alleged obligation of all UN member states to consider al-Bashir's immunity as having been waived against its states parties.

C. Analysis of the Statute-based approach

Many of the questions that the DRC decision raised only concern the Charter-based approach. These questions are irrelevant if Sudan is placed in a similar position as a state party. Under this competing logic, which was adopted by the Chamber in the South Africa decision, it is not necessary to establish whether the Council can implicitly remove immunities or whether there is a textual link in Resolution 1593.

In a general sense, the Statute-based approach is more elegant than the Charter-based approach. By arguing that the Court should treat Sudan for the purpose of the situation in Darfur as a state party, the Chamber envisioned a scenario in which there are no longer any tensions between the legal framework of the ICC and that of the Council, and in which there are no meaningful differences between a 'real' state party and a non-party that is obliged by the Council 'to act like' a state party. In this way, the Statute-based approach avoids most of the questions and problems of the Charter-based approach. That being said, the Statute-based approach does raise a number of other questions.

i. Should the Court treat Sudan as a state party?

Several commentators have challenged the Statute-based approach on the ground that it seems to imply that the Council can extend the powers of the Court under the Statute.[290] Questions have been raised in this regard about the Court's relationship with the Council, and about the principle of attribution of

[290] Jacobs, 'The ICC's Approach to Immunities and Cooperation', pp. 290-291; Kiyani, 'Al-Bashir and the ICC', 475-477. See also Tladi, 'The ICC Decisions on Chad and Malawi', 212.

powers. In a similar vein, Dov Jacobs has challenged the Chamber's South Africa decision by questioning whether the Council has 'the power to aside general rules of international law, such as the relative effect of treaties'. In his view, the South Africa decision is flawed because the Security Council cannot 'make a state akin to a party to a treaty it did not sign'.

In a general sense, these and related questions and concerns about the limits of the Security Council's powers under Chapter VII of the Charter are important and demand consideration. It should also be noted, however, that the Chamber in the South Africa decision did not actually claim that the Court's powers are modified by the Council's Resolution. The Chamber followed Akande in arguing that Sudan has an obligation under the Charter to follow the Court's orders, and that because the Court can only act in accordance with the Statute, the Court has no choice but to treat Sudan as a state party. The legal heart of the Statute-based approach is the assumption that the Court has to consider Sudan as a state party under the Statute, not because of the Council's powers under the UN Charter, but because of the Court's rules under the Statute.

In his 2009 article on the prosecution of al-Bashir, Akande did not provide a detailed analysis of the relevant provisions of the Statute to substantiate this claim. He simply took on the assumption that there is no other way to interpret the Statute than that a non-party that is under an obligation to cooperate with the ICC should be treated by the organs of the Court as a state party. The 'only difference' with an actual state party would be that the obligations for this state do not derive from the Statute, but from the Charter. Based on this assumption, Akande found that Sudan is 'indirectly' subject to the relevant provisions of the Statute.[291] In the South Africa decision, the Chamber similarly assumed that

[291] Note that Akande did not explicitly state that Sudan is bound to 'all' the provisions of the Statute. In fact, in a later contribution (2012), he indicated that for the application of certain provisions of the Statute, which explicitly distinguish between states parties and non-parties, the Court has to treat Sudan (or Libya) as a non-party. See Dapo Akande 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC' (2012) 10 *Journal of International Criminal Justice* 312. In his contribution on the immunity of al-Bashir (2009), Akande stated, however, that the 'only difference' between a state party and Sudan is the source of the obligation (*i.e.,* the Statute *versus* the Charter). See

for the situation in Darfur, it had no choice but to treat Sudan like a state party. In the words of Chamber, 'the necessary effect' of the Security Council's referral is that 'for the limited purpose of the situation in Darfur, Sudan has rights and duties analogous to those of states parties to the Statute'.[292]

In considering this key assumption of the Statute-based approach, it should be noted that the ICC's legal framework is not explicit on how the Court should act when the Council refers a situation in a non-party to the Prosecutor under Article 13(b). There are no specific provisions in the Statute, the RPE, or the UN-ICC Relationship Agreement on how a non-party should be treated upon a Security Council referral.[293] Presumably, the effect of a Security Council Resolution triggering the Court's jurisdiction is that the legal framework of the Statute applies, in its entirety, with respect to the situation referred. So much follows, *inter alia*, from the text of Article 1 of the Statute which provides that 'the

Akande, 'The Legal Nature of Security Council Referrals', 342. If this would indeed be the 'only difference', Sudan would by necessity be bound to 'all' the provisions of the Statute.

[292] ICC South Africa decision (2017), para. 88. The Chamber emphasized in this respect 'that Sudan's rights and obligations are only those related to the situation referred by the Security Council and strictly within those parameters'. For this reason, the Chamber added that 'Sudan does not have rights and obligations with respect to other Statute-based activities of the Court, and … does not have the right to vote in the [ASP] and does not pay contributions towards the expenses of the Court in line with Article 115 of the Statute' (para. 90).

[293] Apart from Article 13(b) itself, the only references that are made in the Statute to the Council's referral power address the communication between the Court and the Council at different stages of the proceedings. See Articles 53(2)(c) and 53(3)(a) (on the Council's role in the initiation phase of an investigation, and especially on the Council's right to be informed about a decision of the Prosecutor not to initiate an investigation or prosecution, and its right to ask for a review of such a decision by the PTC); Articles 87(5)(b) and 87(7) (on referring situations of non-cooperation to the Council); and Article 115(b) (on funding referrals). The only references to Article 13(b) and the Council in the RPE are found in Rule 44 (which states that 'a referral of a situation to the Prosecutor shall be in writing'); Rule 105 and Rule 106 (on the notification of a decision by the Prosecutor not to initiate an investigation/or not to prosecute); Rule 107(4) and Rule 108(2) (on a request from the Council for review under Article 53, paragraph 3 (a) or (b)). The only relevant provision in the Relationship Agreement is Article 17, which discusses the cooperation between the Council and the Court, but it only concerns communication and the Council's responses to a decision under Articles 87(5)(b) and 87(7).

jurisdiction and functioning of the Court shall be governed by the provisions of the Statute'.[294] However, the fact that the Statute applies does not necessarily justify the assumption that a non-party like Sudan ought to be regarded as a state party. There are two problems with this assumption.

Firstly, this assumption ignores the conceptual difference between (A) the *legal basis* of the Court's decisions and (B) the presumed *indirect effect* of those decisions (through the UN Charter). The indirect effect of the Court's decisions, as binding on Sudan under the UN Charter, might indeed be that Sudan is subject to (almost) the exact same obligations as a state party, but this is something different than to say that the Court should treat Sudan under the Statute as a state party. By assuming that Sudan is effectively bound to (all) the provisions of the Statute, the Statute-based approach conflates the presumed indirect effect of Sudan's obligations under the UN Charter (as creating similar obligations as a state party) with the basis on which the Court should treat Sudan (the Statute).

Secondly, and more to the point, the assumption that the Court can only treat Sudan as a state party turns a blind eye to the provisions in the Statute that explicitly distinguish the legal position of a state party from that of a non-party.[295] When the Statute only refers to a state party, or to a non-party,

[294] Article 13 also indicates that the Court has to exercise its jurisdiction 'in accordance with the provisions of the Statute', and Article 21 mandates the Court to apply 'in the first place', the Statute. The Chamber comes to the same conclusion in the South Africa decision (para. 85-86), and refers to a number of earlier decisions of other Chambers, including *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11-01/11-163), Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to Article 95 of the Rome Statute, 1 June 2012, paras. 28-29; *Situation in Darfur* (ICC-02/05-189), Decision on Application under Rule 103, 4 February 2009, para. 31. See also the Minority Opinion of Judge de Brichambaut, para. 4.

[295] Many provisions generally speak of 'a state' (including on the definitions of the crimes, the articles on admissibility and the notions of criminal responsibility). Other provisions are only directed at states parties (including, Article 9, 36(4), 44(4), 48, 57(3), 70(4), 86, 87(1), 88, 91(4) and 93) or at the host state (Articles 3 and 103(4)), and some provisions envisage two scenario's, one in which the state concerned is a state party and the other in which the state is not a party to the Statute. For example, Article 73 of the Statute provides that: 'if a state party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a state party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure

why would Sudan have to be treated by the Court as a state party? If the Court can only act in accordance with the Statute, I do not see how it can be denied that the Court has to treat Sudan as a non-party, especially when the Statute speaks specifically of a state party or a non-party. There is simply no textual argument, neither in the Resolution (which accepts the distinction between states parties and non-parties) nor in the Statute, for treating Sudan as a state party. As stated in the minority opinion of Judge de Brichambaut, if a Security Council referral triggers the applicability of the entire Statute, it logically follows that the referral 'also activates provisions relevant to non-state parties', which indicates in turn 'that such a referral need not necessarily render a non-state party analogous to a state party to the Statute'. In order to claim that Sudan is somehow in the same position as a state party, one has to show that the Council or the Statute somehow equated Sudan's status as a non-party with that of a state party under the Statute. If this cannot be done, and again, I do not see how, then the Statute-based approach is based on a flawed assumption.[296]

ii. Treating Sudan as a non-party: what are the consequences for Article 98(1)?

On the basis of the assumption that Sudan should be treated as a state party for the purposes of the situation in Darfur, the Chamber argued in the South Africa decision that a state party like South Africa cannot invoke Article 98(1) to refuse to arrest al-Bashir. According to the Chamber, Article 27(2) 'applies equally with respect to Sudan, 'rendering inapplicable any immunity on the ground of official capacity belong to Sudan that would otherwise exist under international law'.[297] Indeed, if Article 27(2) were to apply to Sudan in the same way as it does to a state party, then it makes sense that Article 98(1)

with the Court, subject to the provisions of Article 72**.** If the originator is not a state party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator' (emphasis added). Other examples can be found in Articles 87(5), 89, 90(4) and, arguably, 98.

[296] The only way is to claim that there is a general *lacuna* in the Statute when it comes to Security Council referrals, and that this lacuna would require the Court to fall back on the Security Council Resolution through Article 21(1)(b).With regard to al-Bashir's immunity, this would raise, however, the questions about the Charter-based approach that were discussed in part V(B). Note that this argument was not considered by either Akande or by the Chamber in the South Africa decision.

[297] ICC South Africa decision (2017), para. 91.

is not applicable to the arrest of al-Bashir, because there is no immunity that needs to be waived.[298] The legal situation becomes more complex, however, if the Court has to treat Sudan for what it is: a state that is not a party to the Rome Statute.

If the Court has to regard Sudan as a non-party, a first question is whether the Court still has jurisdiction to prosecute al-Bashir. Article 27(2) indicates that the Court's judges must ignore immunities that would otherwise pose a procedural bar to the exercise of the Court's jurisdiction.[299] In order to claim that al-Bashir's immunity limits the Court's jurisdiction under the Statute, one has to show that Article 27(2) somehow does not apply to non-parties. This would arguably mean that there is a *lacuna* in the Statute when it comes to the jurisdiction of the Court in relation to the immunities of non-parties. If the existence of such a gap could be shown, Sudan still has an obligation under the UN Charter to cooperate fully with the Court, which logically includes the obligation to waive any relevant immunities when requested to do so. Presumably, the Court could act on this obligation vis-à-vis Sudan through Article 21(1)(b).[300] Simply put, even if the application of Article 27(2) should be limited to (nationals of) states parties, al-Bashir's immunity probably does not pose a procedural bar to the exercise of the Court's jurisdiction.

That being said, if Sudan is to be treated as a non-party, the Chamber's conclusion in the South Africa decision that Article 98(1) does not apply is more difficult to accept. For as long as the Court has not received cooperation from Sudan for the waiver of al-Bashir's immunity, states parties (and non-parties) should, in principle, be able to invoke Article 98(1). So much was also acknowledged in the minority opinion of Judge de Brichambaut, who stated that the referral did not 'exclusively activate Article 27(2) … but preserved the possibility to apply Article 98(1) of the Statute, which allows a non-

[298] Assuming that Article 98(1) only applies to non-parties. For further discussion and references on this assumption, see part II(B) in this chapter.

[299] Jacobs, 'The ICC's Approach to Immunities and Cooperation', pp. 291-292.

[300] Another way to address this situation is to question is to argue that Article 27(2) reflects customary international law, as discussed in part II(A).

state party to invoke the immunities of certain officials vis-à-vis the Court or a state party in certain circumstances'.[301]

An important consideration in this regard is that jurisdiction and immunities are 'distinct concepts'.[302] The fact that the Court has jurisdiction to prosecute al-Bashir does not exclude the possibility that his immunity still poses a procedural bar to the cooperation of states with this prosecution. An even more important consideration, however, is that Article 98(1) specifically addresses the legal position of a 'third state'. This reference should, at least with respect to the immunities of state officials, be interpreted to mean a state that is not a party to the Statute.[303] Article 98(1) distinguishes the legal position of states parties from the legal position from non-parties, and this distinction must be applied by the Court, regardless of the manner in which the Court has obtained jurisdiction.

To argue that Article 98(1) does not apply, even if Sudan is to be treated by the Court as a non-party, one of the following propositions needs to be proven:

(A) Al-Bashir's immunity from arrest has disappeared because of an exception under customary international law, as argued by PTC I in the Chad and Malawi decisions.

(B) The Council has somehow removed al-Bashir's immunity from arrest (an imposed waiver), as argued by PTC II in the DRC decision.

(C) The Court can hold Sudan's obligation under the UN Charter to waive al-Bashir's immunity against states parties (an obliged waiver), as suggested by de Wet.[304]

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[301] Minority Opinion of Judge de Brichambaut, para. 56.

[302] *Ibid.*

[303] This is also acknowledged by the South Africa decision, which stated that 'with respect to states that are not parties to the Statute, the applicable regime is that of Article 98(1) of the Statute' (para. 82). Judge de Brichambaut came to the exact same conclusion that 'the reference to "third state" in Article 98(1) of the Statute … must be interpreted to mean a non-state party. For further discussion and references, see part II(B) in this chapter.

[304] Given the Statute's silence on how the Court should apply provisions to a non-party, especially when these provisions are only addressed to states parties or to the Court itself, it can be argued that there exists a gap in the Statute on how the Court

(D) Article 98(1) does not cover the immunity of Heads of State, as argued by Tladi and Iverson.[305]

(E) Sudan is a party to another treaty that includes a permanent waiver for al-Bashir's immunities, as argued in the minority opinion of Judge de Brichambaut;[306]

For its part, the Chamber did not defend any of these propositions in the South Africa decision. Like Akande, the Chamber acted solely and without proper explanation on the assumption that is had no choice but to treat Sudan for the purpose of the situation in Darfur as a state party. The main problem with this assumption, however, is that it ignores that Article 98 and several other provisions of the Statute explicitly distinguish the legal position of a state party from the legal position of a non-party. In the application of these provisions, I believe that the Court should treat Sudan as a non-party. This means that Article 98(1) continues to apply, unless al-Bashir's immunities are waived, removed or made inapplicable in some other way.

In sum, the DRC and South Africa decisions are similar in the sense that in both decisions the Chamber took a turn to the Security Council. The two decisions differ profoundly, however, in their

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should deal with non-parties and that the Court would have to resort to the Resolution of the Council under Article 21(1)(b) to fill this gap. In this regard, the Court would probably be able to invoke Sudan's obligation to cooperate fully with the Court against Sudan itself, and might thus require Sudan to waive al-Bashir's immunity. Yet, it is questionable whether the Court is permitted to invoke this obligation against states parties as well, because based on the principle of attribution of powers the Court cannot absorb the legal powers of the Council, including its (alleged) ability to override customary international law. Consequently even if there exists a gap in the Statute which needs to be filled by, *inter alia*, the Council's Resolution, Article 98(1) would likely continue to apply

[305] For further discussion and references on this approach, see part II(B) of this chapter.

[306] In his Minority Opinion, Judge de Brichambaut argued, based on a detailed interpretation of Articles IV and VI of the Genocide Convention (paras. 4-37), that as a contracting party 'Sudan must be regarded to have relinquished the immunities of its 'constitutionally responsible rulers' when acceding to the Convention' (para. 38). In contrast, the majority concluded that the Genocide Convention does not include an 'implicit exclusion of immunities', *inter alia*, because the Convention 'does not mention immunities based on official capacity' (para. 109). For further discussion on this matter, see the references in footnote 70 of this chapter.

assessment of the effect of the Security Council's referral on al-Bashir's immunity from arrest. The DRC adopted a Charter-based approach, whereas the South Africa decision employed a Statute-based approach. Both approaches may have certain merits, but in my opinion neither the DRC decision nor the South Africa decision offered a convincing line of argumentation as to why al-Bashir would not enjoy immunity from arrest in the meaning of Article 98(1) of the Statute.

VI. Ambiguity and Uncertainty in the ICC's Immunity Regime

The different decisions of the Chamber and the two variants of the Security Council avenue have been debated extensively. Irrespective of one's position on this matter, there is no denying that al-Bashir's immunity remains a heavily contested issue. Past debates in the Council and the ASP highlight that not only commentators, but also states strongly disagree on how the relevant provisions of the Statute and Resolution 1593 should be interpreted. While some states parties have expressed support for the Chamber's differing decisions,[307] other states, including Russia, China, South Africa and Nigeria have argued that al-Bashir enjoys immunity from arrest under customary international law and that states parties can invoke Article 98(1) to refuse cooperation with the demanded arrest of the Sudanese President.[308]

[307] In support of the Chamber's response, see the statements of the United Kingdom and Spain in UNSC, S/PV.7478, 29 June 2015. See also the statements of Ukraine in UNSC, S/PV.7710, 9 June 2016; of Guatemala in UNSC, S/PV.7080, 11 September 2013; of Australia in UNSC, S/PV.7337, 12 December 2014; of Columbia in UNSC, S/PV.6887, 13 December 2012; and of France and Germany in UNSC, S/PV.6778, 5 June 2012.

[308] Against the Chamber's response to al-Bashir's visit to South Africa, see especially the statement of Russia in UNSC, S/PV.7963, 8 June 2017 (stating that 'on more than one occasion, we have called attention to the fact that the obligation to cooperate, as set forth in resolution 1593 (2005), does not mean that the norms of international law governing the immunity of the Government officials of those States not party the Rome Statute can be repealed, and presuming the contrary is unacceptable'); the statements of Angola and Russia in UNSC, S/PV.7582, 15 December 2015; the statements of Angola, Russia and Venezuela in UNSC, S/PV.7478, 29 June 2015; and of Burundi, China and Ethiopia (on behalf of the AU) in ASP, General Debate of the Fourteen Session, 18-19 November 2015. See also the statements on immunity of Egypt and Bolivia in

In light of these competing views, the Chamber's position that there is no ambiguity or uncertainty on this matter is questionable. In June 2015, Single Judge Tarfusser argued in reference to the DRC decision that there exists 'no ambiguity or uncertainty with respect to the obligation … to immediately arrest and surrender Omar al-Bashir'.[309] In a similar vein, the Chamber concluded in the South Africa decision that 'any ambiguity as to the law concerning South Africa's obligations has been removed'.[310] Of course, the different decisions of PTC I and PTC II have not left much doubt that the Court's judges are unlikely to accept a claim under Article 98(1) in the case of al-Bashir, and that in their view all states parties are under an obligation to arrest him. Moreover, there is no question that the Court has the final say on the interpretation and application of Article 98(1).[311] Yet, does this really justify the conclusion that there exists no 'ambiguity or uncertainty' about the obligation of states parties to arrest al-Bashir?

A. Ambiguity and uncertainty in international law

In a general sense, international law is subject to different types and levels of uncertainty, and to various forms of ambiguity. A first distinction may be drawn between ontological and epistemological uncertainty.[312] As explained by Jörg Kammerhofer, the question of epistemological uncertainty for

UNSC, S/PV.7963, 8 June 2017; Egypt and Russia in UNSC, S/PV.7833, 13 December 2016; South Africa, Tanzania and Uganda in ASP, General Debate of the Fifteenth Session, 16-17 November 2016; of Egypt, Russia and Venezuela in UNSC, S/PV.7710, 9 June 2016; of Russia, Malawi, Lesotho (on behalf of the African states parties to the ICC) and China in ASP, General Debate of the Thirteenth Session, 8-17 December 2014; of Nigeria, Ghana, Russia and Congo in ASP, General Debate of the Twelfth Session, 20-26 November 2013; of Ghana and Russia in ASP, General Debate of the Eleventh Session, 15 November 2012; of Algeria in UNGA, A/69/PV.35, 31 October 2014; of Rwanda and Russia in A/68/PV.42, 31 October 2013; of Iran in UNGA, A/65/PV.41, 29 October 2010; and of Egypt in UNGA, A/65/PV.39, 28 October 2010. See also the analysis of some of these statements in the Minority Opinion of Judge de Brichambaut, paras. 86-91.

[309] ICC South Africa decision (2015), para. 1. The Single Judge also stated more generally that there is 'no ambiguity in the law' (para. 5).

[310] ICC South Africa decision (2017), para. 137.

[311] As discussed above, in part II(B).

[312] Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Abingdon: Routledge, 2010), p. 4.

international law is whether we can accurately perceive international law, whereas ontological uncertainty is concerned with the more direct question 'of what happens when international law itself is, [or] when the norms themselves are, problematic'.[313]

In his work on uncertainty in international law, Kammerhofer has identified four levels of epistemological and ontological uncertainty in international law: (A) the uncertainty of substantive legal norms, (B) the uncertainty of law-making norms or the law on sources, (C) uncertainty as to the 'possibility' of a source or the constitution of international law and (D) finally, uncertainty in the theory of norms.[314] With respect to the first level of uncertainty, which is the most relevant here, he described ambiguity (or equivocation) as a lack of determination of a term's connotation in a norm.[315] In addressing the uncertainty of substantive legal norms, he further observed that the tools of interpretation, subsumption[316] and modification often imply both epistemological and ontological uncertainty. Epistemological uncertainty is, in this respect, 'caused by a conglomerate of factors' with some being rooted in the nature of human language itself and others in the way that international law and

[313] *Ibid.*

[314] *Ibid.*, pp. 3-4.

[315] Kammerhofer, 'Uncertainty in International Law', p. 118. In discussing semantic uncertainty with respect to substantive legal norms, Kammerhofer mentioned ambiguity or equivocation as a first reason for indeterminacy. He also pointed, in reference to Michael Thaler, to vagueness (*Vagheit*). Ambiguity is a lack of determination of a term's connotation. This connotation is usually determined *a priori* by a language's rules of semantics. Ambiguity or equivocation occurs when a word can connote two entirely different things (like a 'star') and the context cannot determine the 'correct' meaning for us. In contrast, 'vagueness is the lack of determination of a term's denotation (*Bezug*)'. This denotation is determined 'by the class of objects properly signified by the term, based on empirical experience'. In reference to Michael Thaler, *Mehrdeutigkeit und Juristische Auslegung* (Vienna: Springer-Verlag, 1982), p. 2.

[316] Subsumption (or matching facts and norms) is the procedure where there is 'a general term and (typically, though not exclusively) a fact and the task is to find out whether the fact is part of the class of objects fitting that term's denotation'. That procedure is a 'categorically different action to interpretation', as it is 'no longer cognition, but an application of the law'. Indeed, as Kammerhofer argued, subsumption 'is not logical deduction, but either an act of law-making or nothing at all'. Kammerhofer, 'Uncertainty in International Law', p. 121.

international courts apply these tools.[317] In turn, ontological uncertainty of substantive legal norms is the result of different factors. Within the specific context of a treaty regime that is presided over by an international court, like the ICC controls the Statute, important sources of ontological uncertainty are the different intentions of the parties to a treaty, indeterminate language in that treaty and the intricate ways in which courts may apply its rules and principles.[318]

B. Ambiguity and uncertainty in the ICC's immunity regime

Kammerhofer's general description of ambiguity and uncertainty in international law helps to understand how the ICC's immunity regime is by its very legal nature subject to ambiguity and uncertainty. In the scenario that the Court demands the arrest of the official of a non-party, over which the Court has jurisdiction through a Security Council referral (*i.e.*, the specific case of al-Bashir), there are at least three significant manifestations of ambiguity and uncertainty.

First of all, the language of Article 98(1) is equivocal. The concept of 'state immunity' has different connotations. Most commentators believe that state immunity includes the immunities of Heads of State, but others have argued that Article 98(1) only covers diplomatic missions.[319] These different views illustrate that Article 98(1) is subject to some degree of semantic ambiguity.

Second of all, Article 98(1) refers to norms that exist outside of the Statute, which are themselves manifestly subject to ambiguity and different types of uncertainty. It remains highly uncertain, for example, what the rules of state and diplomatic immunity are under customary international law, how they come to exist and how the Court can perceive these norms accurately. In this regard, the different views of commentators on the Arrest Warrant case of the ICJ, the Taylor decision of the Special Court

[317] *Ibid.*, p. 124.

[318] With regard to the last factor, Kammerhofer referred to the problem of subsumption. Like the problem of interpretation (and modification), subsumption is, above all, a question of epistemological uncertainty. Within the context of a treaty regime like the ICC that is presided over by a court, it raises the question how the judges of a court can accurately perceive international law. However, in this context, subsumption can also raise the question of ontological uncertainty, as the way in which a court matches facts and norms can be so intricate that it becomes uncertain what norms there are and how they come to exist.

[319] Tladi, 'The ICC Decisions on Chad and Malawi', 215-216. As discussed in part II(B).

and the Chad and Malawi decisions of the PTC demonstrate that these rules raise various questions of ontological and epistemological uncertainty. Most importantly, it is quite unclear whether there exists some sort of exception under customary international law for the prosecution of international crimes by an international court (ontological uncertainty) and how a court can, in theory, determine the existence of such an exception (epistemological uncertainty).

Finally, a third manifestation of ambiguity and uncertainty in Article 98(1), is that the Statute does not explain how the obligations of a non-party towards the ICC under the UN Charter affect the application of this provision by the Court. While it may be established that for the concerned state (*i.e.*, Sudan) the obligation under Chapter VII has priority over any other conventional obligation (through Article 103), the ICC's immunity regime fails to explain whether the Court can act upon this obligation towards other states (*i.e.*, DRC, South Africa etc.). The Statute does not explicitly address the 'indirect horizontal application' of Security Council obligations, and is as such subject to a significant amount of ontological uncertainty.

C. Ambiguity and uncertainty about the obligation to arrest al-Bashir

These different manifestations of ambiguity and uncertainty in the ICC's immunity regime do not necessarily have any implications for the (ir)relevance of al-Bashir's immunity and the obligation of states parties to arrest him. While international law in general and the ICC's immunity regime in particular are by their legal nature subject to ambiguity and uncertainty, this does not mean that the interpretation and application of the relevant rules and principles by the Court's judges are also surrounded by ambiguity and uncertainty.

One of the central features of international courts is that they are authorized to take away doubts about what 'the law' requires for those who are bound to their decisions. Within the logic of the Rome Statute, and the logic of international courts more generally, the Court's judges have the authority to 'choose' a particular interpretation as being the most convincing one,[320] and to bind states and

[320] Hans Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1967), pp. 82-83. This is further discussed in chapter 1, part II.

individuals to this interpretation as applied in a specific case.[321] In accordance with the general rule of interpretation (and by applying the tools of modification and subsumption), the Court's judges are in a position to resolve any inherent ambiguity and uncertainty in the ICC's immunity regime, and to establish how states and individuals should understand the relevant norms, including Article 98(1). In this way, the Court's judges can ensure that there exists no ambiguity or uncertainty about a certain obligation, like the obligation of states parties to arrest al-Bashir.

The question is, however, whether the Court's judges have been successful in this regard. In my opinion, this is not the case. PTC I and PTC II have made it crystal-clear that all states parties have an obligation to arrest al-Bashir. As such, they will not likely accept any claim from a state party under Article 98(1). Their decisions are binding for the involved states parties. Yet, the Chambers have not been consistent and clear when it comes to the reasons why these and other states parties cannot invoke Article 98(1).[322]

As shown, the DRC decision has failed to answer fundamental questions about the Charter-based approach, and more specifically about the powers of the Council, the interpretation of Resolution 1593, and the ability of the Court to act on the basis of the Council's legal powers under Chapter VII. In light of these unresolved questions, the conclusion of Judge Tarfusser that the DRC decision has not left any 'ambiguity or uncertainty' about the obligation to arrest al-Bashir must be opposed.[323] The

[321] Article 21(2) of the Statute rejects the stare decisis doctrine. As discussed in chapter 1, part I(C).

[322] Note that other states parties are not actually parties to a case on the-compliance of other states parties. This means that other states parties are, strictly speaking, not bound to earlier non-compliance decisions in terms of dictum and reasoning.

[323] Note that the Prosecutor has publically supported the conclusion of Judge Tarfusser by saying that: 'the Court has ruled on several occasions that in the specific case of Mr. Al-Bashir, States parties are obliged to arrest and surrender him should he travel to their territory. That is why non-compliance findings have been made and referred to the Council in that case. For example, this obligation is clear from the same 2014 decision finding the Democratic Republic of the Congo in noncompliance to which I have referred. It is also crystal-clear from the June 2015 decision in which the Pre-Trial Chamber also wrote that there exists no ambiguity or uncertainty with respect to the obligation of the Republic of South Africa to immediately arrest and surrender Mr. Al-Bashir to the Court. What I want to stress by referring to this decision is that the Court has made plain on

Chamber (including Judge Tarfusser) also acknowledged as much, when deviating from the DRC decision in the South Africa decision and adopting a Statute-based approach.

As employed by the Chamber, the Statute-based approach does not resolve any possible ambiguity and uncertainty in the law either. Most importantly, the Chamber did not offer a real explanation as to why Sudan should be treated as a state party. The Chamber acted without proper explanation on the assumption that is had no choice but to treat Sudan for the purpose of the situation in Darfur as a state party. The main problem with this assumption is that it ignores that Article 98 and several other provisions of the Statute explicitly distinguish the legal position of a state party from the legal position of a non-party. In the application of these provisions, I believe that the Court should treat Sudan as a non-party. This means that Article 98(1) continues to apply, unless al-Bashir's immunities are waived, removed or made inapplicable in some other way.

Looking forward, there are several ways for the Court and its states parties to clarify the ICC's rules on immunity in general and the matter of al-Bashir's immunity in particular. A first and most logical option is a decision from the ICC's Appeals Chamber on the case of al-Bashir.[324] A state that becomes involved in non-cooperation proceedings under Article 87(7) of the Statute could decide to appeal a (future) decision of the Pre-Trial Chamber (in accordance with Article 82(1)(a) and/or Article 82(1)(d) of the Statute).[325] In my opinion, a judgment of the Appeals Chamber on the interpretation and

several occasions what the answer is to the apparent tensions between articles 27 and 98 in the case of Mr. Al-Bashir'. Statement of the Prosecutor in UNSC, S/PV.7710, 9 June 2016.

[324] See also Max Du Plessis and Dire Tladi, 'The ICC's immunity debate - the need for finality', *EJIL Talk*, 11 August 2017.

[325] As stated in Article 82 'either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: (a) A decision with respect to jurisdiction or admissibility; …. (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings'. For further discussion on the scope of Article 82, see chapter 4, part IV(D). Remarkably, none of the African states parties that have welcomed al-Bashir on their territory has filed an appeal against the respective decisions of the PTC. Note that none of the discussed decisions (like the decisions on the non-cooperation of the DRC, or the most recent decision on the non-cooperation of South Africa) can still be appealed. As stated in Rule 155(1): 'When a party wishes to appeal a decision under

application of Article 98(1) may materially advance the proceedings in the case of al-Bashir and by addressing the aforementioned questions it could take away (some of) the ambiguity and uncertainty surrounding the obligation of states parties to arrest al-Bashir.[326] As explained in chapter 1, a judgment of the Appeals Chamber is binding for the Pre-Trial Chamber (or Trial Chamber) in the same case and would thus prevent further competing decisions at the pre-trial level on the (ir)relevance of al-Bashir's immunity.[327]

A second option is the rendering of an advisory opinion of the International Court of Justice.[328] When asked by the UN General Assembly (or another organ of the UN in accordance with Article 96 of

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article 82, paragraph 1 (d), or article 82, paragraph 2, that party shall, within *five days* of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal' (emphasis added).

[326] Note that the Prosecutor has suggested this possibility before the Security Council: 'If States parties disagree with these decisions, the appropriate response is to challenge them before the Court through the legal process if necessary and seek to appeal decisions if they disagree with them. That is the correct way. That is the legitimate way to receive legal disputes and to respect the rule of law'. Statement of the Prosecutor in UNSC, S/PV.7710, 9 June 2016.

[327] As discussed in chapter 1, part I(C).

[328] In June 2012, the AU Assembly considered approaching the ICJ, through the UN General Assembly for an advisory opinion on the matter, but this proposal did not gain much momentum at the time. AU Assembly, Decision on the implementation of the Decisions on the International Criminal Court, Assembly/AU/Dec.419(XIX), 15-16 July 2012. On the request of the Assembly, the Commission did undertake a study 'on the advisability and implications of seeking such an advisory opinion from the ICJ' (para. 3). See AU Consultancy, Study on the Advisability of seeking an Advisory Opinion of the International Court of Justice on the question of Immunities of Heads of State and other senior state officials of States Not Party to the Rome Statute, December 2013 (on file with the author). Recently, the possibility of an ICJ advisory opinion attracted attention from commentators again with the idea that this could help to convince South Africa to reconsider its decision to leave the ICC. On the proposal of an ICJ advisory opinion, see generally Dapo Akande, 'An International Court of Justice Advisory Opinion on the ICC Head of State Immunity Issue', *EJIL Talk*, 31 March 2016; Dapo Akande, 'The African Union's Response to the ICC's Decisions on Bashir's Immunity: Will the ICJ Get Another Immunity Case?', *EJIL Talk*, 8 February 2012; Ssenyonjo, 'AU Opposition to ICC', 411-413. Note that in his Minority Opinion Judge de Brichambaut observed that 'some issues mentioned in the debate might have warranted a request for an advisory opinion by the ICJ, but the Chamber does not have the possibility to request such advice' (para. 97).

the UN Charter and Article 65 of the ICJ Statute),[329] the ICJ could help to clarify the rules on state and diplomatic immunity under customary international law.[330] More specifically, the UN General Assembly could ask the ICJ (1) whether the Head of State and/or other state officials of a state that is not a party to the Rome Statute (such as Sudan) are entitled to immunity from prosecution by the ICC under general international law and (2) whether such officials enjoy immunity from arrest and detention in foreign states which are acting upon a request of the Court. Answers to these questions from the ICJ may help to resolve the matter of al-Bashir's immunity, both legally and politically.[331] Of course, the ICC will always have the final say in the case against al-Bashir, but an advisory opinion of the ICJ may provide a helpful starting point to diminish the ambiguity and uncertainty that the previous decisions of the PTC have left about the obligation to arrest him and about the ICC's immunity regime as a whole.

Finally, a last option for the Court's states parties (rather than the Court itself) is to specify the rules for the implementation of Article 97 and 98. Amending these provisions may not be realistic at

[329] In accordance with Article 96(a) of the UN Charter 'the General Assembly or the Security Council may request the (ICJ) to give an advisory opinion on any legal question'. Article 65 of the ICJ Statute confirms that only the organs mentioned in Article 96 of the UN Charter may request an advisory opinion by stating that 'the Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request'. With regard to the relationship between the ICC and the ICJ, Article 119(2) of the Rome Statute provides that disputes between two or more states parties about the interpretation or application of the Statute, but which do not relate to the judicial function of the ICC, shall be referred to the ASP which may make recommendations as to further means of settling the dispute including referral of the dispute to the ICJ. In the course of the negotiations of the Relationship Agreement between the ICC and the UN, it was debated whether the ASP should be given the power to make requests to the ICJ for an advisory opinion. Such a provision was eventually not included in the agreement. As a result, the ASP can only encourage its states parties to request an advisory opinion to the ICJ through the UN General Assembly or the Security Council (and perhaps ask the General Assembly or the Security Council directly). Schabas, 'Commentary', pp. 1163-1165.

[330] Before the ICJ will issue an advisory opinion, it will first have to (1) examine whether it has jurisdiction to give the opinion requested and (2) make a determination as to whether it should use its discretion to decline to exercise its jurisdiction to render an advisory opinion. One reason why the ICJ may be somewhat hesitant to issue an advisory opinion on the immunity of Heads of State in relation to the ICC is that the ICJ might be seen to function as an appellate body of the ICC. On this issue, see Akande, 'ICJ Advisory Opinion (2012)'; AU Consultancy, 'ICJ Advisory Opinion', paras. 8-32.

[331] Akande, 'ICJ Advisory Opinion (2016)'.

this point in time, seeing the difficult procedure of Article 121(4) of the Statute (requiring ratification or acceptance of an amendment by seven-eighths of the states parties) and the strong political disagreement on this matter. Yet, recent discussions in the ASP do show that there is a willingness among states parties to specify the rules on the consultation procedure of Article 97.[332] At the initiative of South Africa, the ASP agreed in 2015 to set up a working group on the implementation of this provision.[333] Discussions in the context of this working group could form the first step in a longer political dialogue on the improvement of the ICC's immunity regime as a whole, including the relation between Article 27(2) and Article 98(1).

For the time being, however, Article 98(1) and the specific question of al-Bashir's immunity remain surrounded by ambiguity and uncertainty. PTC I and PTC II have left many fundamental questions unanswered. In the absence of a judgment from the Appeals Chamber and/or an advisory opinion of the ICJ, lawyers and states can reasonably disagree on the scope of Article 98(1), the relevant rules of customary international law and the obligation of states parties to arrest al-Bashir. In this sense, the ICC's immunity regime remains 'unresolved'.

VII. Conclusion: The ICC's Unresolved Immunity Regime

This chapter examined the responses of the Court's pre-trial chambers to the AU's claim that al-Bashir enjoys immunity from arrest. The AU's claim and especially the visits that the Sudanese President has paid to several African states parties have brought up difficult questions about the ICC's immunity regime in general, about the interpretation and application of Article 98(1) in particular. The bottom-

[332] See the statements of Canada, Ghana, Portugal, South Africa and Uganda in ASP, General Debate of the Fifteenth Session, 16-17 November 2016.

[333] ASP, Report of the Chair of the working group of the Bureau on the implementation of Article 97 of the Rome Statute of the International Criminal Court, ICC-ASP/15/35, 24 November 2016.

line of how the Court's judges have responded to these questions is that states parties cannot invoke Article 98(1) to refuse cooperation with the arrest of al-Bashir.

PTC I and II have consistently opposed al-Bashir's visits, but the reasoning of the Court's judges has changed over the years. Four phases can be identified in the Court's jurisprudence on this matter. In first instance, the Court's judges tried to avoid giving a formal response to the AU's position by passing the matter through to the ASP and the Security Council (*phase I*). However, when the ASP and the Council proved reluctant to take any action against these states, and al-Bashir continued to travel to African states parties, PTC I took the matter into its own hands and issued two consecutive decisions in December 2011. In these decisions, on the non-cooperation of Chad and Malawi, PTC I ruled that al-Bashir did not enjoy immunity from arrest because of an exception under customary international law for the prosecution of international crimes by an international court like the ICC (*phase II*).

A few years later, the Chamber again ruled that al-Bashir did not enjoy immunity from arrest, but on the basis of a completely different line of argumentation. In April 2014, PTC II decided to revise the approach of PTC I in its decision on the non-cooperation of the DRC. The judges of PTC II (including Judge Tarfusser, who had co-authored the decisions of PTC I) argued that Article 98(1) does not apply in the case of al-Bashir, because the Council implicitly waived his immunity when referring the situation in Darfur to the Prosecutor (*phase III*).

Most recently, in July 2017, PTC II revised its approach once more. The Chamber (still including Judge Tarfusser) again turned to the Security Council, but where the DRC decision argued that the Security Council implicitly waived al-Bashir's immunity, the Chamber now rejected this interpretation. In the South Africa decision, the Court's judges concluded, by majority, that Article 98(1) does not apply because the Security Council's referral placed Sudan in a similar position as a state party (*phase IV)*.

Against the background of the ongoing debate on the criminal responsibility of sitting Heads of State under the ICC's immunity regime and international law more generally, this chapter has offered a

detailed analysis of the Chamber's approaches in the DRC and South Africa decisions. Three conclusions of this analysis are worth to recall.

First of all, the Charter-based approach of the DRC decision should be distinguished from the Statute-based approach in the South Africa decision. In the DRC decision, the Chamber suggested that the Court is able to exercise jurisdiction against al-Bashir and to oblige its states parties to arrest him, because the Council has removed his immunity. In the Chamber's eyes, the legal basis of the Court's authority to ignore al-Bashir's immunity from arrest is the power of the Council under Chapter VII of the Charter. In contrast, the South Africa decision reasoned that al-Bashir does not possess immunity in relation to the ICC, and states parties are not able to invoke Article 98(1), because Sudan is indirectly bound to the Statute, including Article 27(2).

Second of all, the two variants of the Security Council avenue are both based on an unconvincing interpretation of the Rome Statute, the Resolution of the Council and/or international law more generally. With respect to the Charter-based approach of the DRC decision, there remain unresolved questions about the powers of the Council, the interpretation of Resolution 1593, and about the ability of the Court to act on the basis of the Council's enforcement powers under Chapter VII. In discussing these questions, I have argued, *inter alia*, that the Council cannot remove immunities in an implicit manner and that even if the Court would have this power, the Resolution cannot be interpreted to encompass an implicit removal. In my opinion, Resolution 1593 'only' creates an obligation for Sudan to waive the immunities of its officials when this is requested by the Court. This interpretation fits best with the ordinary meaning of Sudan's obligation to 'cooperate fully' and acknowledges the fact that the Council did not (have to) discuss the issue of the immunities of Sudan's officials at the time when the Resolution was adopted.

Furthermore, if all UN member states would have an obligation to consider al-Bashir's immunities as having been waived, as argued by de Wet, then the Court is not a position to hold this obligation against its states parties. For as long as Sudan has not acted on its obligation to waive al-Bashir's immunity, states parties would act inconsistently with their obligation under international law to respect this immunity when they would decide to arrest the Sudanese President. Article 98(1)

continues to apply, because the Court cannot absorb the powers of the Council under the Chapter VII and Article 103 of the Charter.

With regard to the alternative Statute-based approach, I have underscored that this approach prompts unanswered questions as well, especially about how the Court should act upon a Security Council referral. In addressing these questions, I have taken a different position than Akande by arguing that the Court should treat Sudan, as a matter of principle, as a non-party. There is no textual argument, neither in the Resolution (which accepts the distinction between states parties and non-parties) nor in the Statute, for treating Sudan as a state party. This means that Article 98(1) continues to apply in the case of al-Bashir, for as long as his immunity has not been explicitly waived, removed or otherwise made inapplicable.

Finally, the third conclusion that should be recalled is that there remains ambiguity and uncertainty about the obligation of states parties to arrest al-Bashir. The Chamber has been very clear that all states parties have an obligation to arrest the Sudanese President. However, the Chamber's decisions have been inconsistent and far from clear about why states parties cannot rely on Article 98(1). As said, the Chamber's rulings on al-Bashir's visits to the DRC and South Africa have raised a whole range of difficult questions about both the Charter-based and the Statute-based approach. These questions highlight that the Court's judges have not managed to resolve the ambiguity and uncertainty that is inherent in the ICC's immunity regime.

There are several ways in which the Court and its states parties can seek to clarify the ICC's rules on immunity in general and the matter of al-Bashir's immunity in particular. Most importantly, affected states could pursue a judgment from the ICC's Appeals Chamber on the question of al-Bashir's immunity, or try to obtain an advisory opinion from the ICJ on this matter. Both the Appeals Chamber and the ICJ could help to take away (some of) the ambiguity and uncertainty surrounding the obligation of states parties to arrest al-Bashir. Moreover, the ICC's immunity regime could benefit from more specific rules on Article 97 and 98 of the Statute, and possibly an amendment of these provisions in the future.

Ultimately, the AU's claim that al-Bashir enjoys immunity from arrest should be understood as a product of the existing tension in the ICC's immunity regime, and in international law more generally, between 'old' rules that require states to recognize the immunities of foreign state officials and 'new' rules and principles that demand the prosecution of these officials when they have committed serious crimes. In response to the AU, the Court's judges have tried to circumvent this tension in no less than four different ways. Yet, each of these ways, has turned out to be ineffective (phase 1) or controversial (phases 2, 3 and 4), leaving the ICC's immunity regime and the matter of al-Bashir's immunity surrounded by ambiguity and uncertainty.

As a final conclusion it is quite unsatisfying to observe that the question of al-Bashir's immunity remains a difficult matter. However, it is important to realize that the continuing complexity and controversy of al-Bashir's immunity is precisely the reason why the AU's juxtaposition between arrest and immunity continues to be powerful, in the sense that it generates a significant amount of political and academic support. The AU and individual African states parties like South Africa have not just pointed to some of the most intricate provisions in the Rome Statute, but to a broader problem in international law. The reconciliation of notions of state sovereignty and sovereign equality with increasing demands of human rights is perhaps the single most important challenge of international law today. What the interactions between the AU, the ICC and its states parties about the immunity of al-Bashir show in this respect is that the international community remains strongly divided on how to address this challenge.

Chapter 4

Sitting Heads of State at Trial[1]

Equality before the law is an internationally recognized human right and an important principle of international criminal law.[2] The Rome Statute acknowledges this principle in Article 21(3) by prohibiting any 'adverse distinction' based on any ground or status.[3] In addition, Article 27(1) provides that the Court shall apply the Statute 'equally to all persons without any distinction based on official capacity'. As a matter of principle, a sitting Head of State or other state official is subject to the Statute in the same way as any other accused. The official status of a person is, by itself, no reason to exempt that person from criminal responsibility or to treat that person differently in the course of the Court's proceedings.

That being said, a trial against a sitting Head of State is an exceptional situation. If the accused continues to function as sitting Head of State, he or she has to attend to official responsibilities during the course of the trial. In light of these responsibilities, it may reasonably be asked whether a sitting Head or Deputy Head of State requires a somewhat different treatment than other accused. In the context of the AU's opposition against the ICC, this question became of particular relevance in 2013, when

[1] This chapter builds on Abel S. Knottnerus, 'Extraordinary Exceptions at the International Criminal Court: The (New) Rules and Jurisprudence on Presence at Trial' (2014) 13 *The Law and Practice of International Courts and Tribunals* 261-285; Abel S. Knottnerus, 'The International Criminal Court on Presence at Trial: The (In)Validity of Rule 134*Quater'* (2014) 5 *International Crimes Database Brief* 5, 1-11; Abel S. Knottnerus, 'The Growing Rift between Africa and the International Criminal Court: The Curious (Im)possibility of a Security Council deferral' *(*2013) 26 *Hague Yearbook of International Law* 34-56*;*Abel S. Knottnerus, 'Extraordinary Exceptions at the ICC: What happened with Rule 134*Quater*?', *Opinio Juris*, 18 July 2014; Abel S. Knottnerus, 'Kenyatta (finally) has to go back to The Hague', *Opinio Juris*, 1 October 2014.

[2] See, for example, Article 3(1) of the African Charter on Human and Peoples' Rights which states that 'every individual shall be equal before the law', the first line of Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) which provides that 'all persons shall be equal before the courts and tribunals' or Article 26 of the ICCPR which stresses that 'all persons are equal before the law and are entitled without any discrimination to the equal protection of the law'.

[3] On Article 21(3), see chapter 1, part I(D).

Uhuru Kenyatta and William Ruto were elected as President and Deputy President of Kenya just before the start of their trials at the ICC,.

Upon the inauguration of the two new Kenyan leaders, the AU immediately rejected the prospect that their trials would continue as scheduled. According to the AU, the continuation of their trials would risk to undermine the stability of Kenya and would distract Kenyatta and Ruto in the exercise of their constitutional obligations.[4] The AU Assembly therefore called upon the Court and the Security Council to suspend their cases. As discussed in chapter 2, the AU first asked the Court to refer the trials back to the Kenyan Judiciary,[5] and then agreed in October 2013 to pressure the Security Council to defer these cases for a renewable period of twelve months.[6]

Knowing that these attempts might prove unsuccessful, the AU also supported a special application from the Defence Teams of Kenyatta and Ruto. This application asked the Court to excuse the two Kenyan leaders from continuous presence during their trials so that they would be able to continue to exercise their official responsibilities as sitting Head and Deputy Head of State. In other words, the AU asked the Court to treat Kenyatta and Ruto differently than other accused.

With respect to presence at trial, Article 63(1) of the Statute provides that 'the accused shall be present at trial'.[7] In search for an exception to this rule as well as to the equal treatment principle that is

[4] These responsibilities are listed in part 2 of chapter 9 of the Kenyan Constitution (Articles 131-151). Note that there is only one Deputy President in Kenya and that he or she is considered to be 'the principal assistant of the President' and 'shall deputise for the President in the execution of the President's functions' (Article 147). Constitution of Kenya, 27 August 2010, available online at: <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010>.

[5] AU Assembly, Decision on International Jurisdiction, Justice and the International Criminal Court, Assembly/AU/Dec.482(XXI), 27-28 May 2013, para. 7.

[6] AU Assembly, Decision on Africa's Relationship with the ICC, Ext/Assembly/AU/Dec.1(Oct.2013), 11-12 October 2013, para. 6 and 10.

[7] This provision is in accordance with the defendant's right to be tried in his or her presence. This right is, for example, laid down in Article 14(3)(d) of the ICCPR, Article 6(3) of the ECHR and Article 8(2)(d) of the ACHR. In certain civil jurisdictions (including France, Germany, Italy and the Netherlands) trials *in absentia* are allowed, but only under strict conditions in order to ensure minimum fair trial standards. Note that it has become common practice in international criminal proceedings that if

embedded in Article 27(1), the AU argued that if the trials of Kenyatta and Ruto would continue, the Court would have to treat them differently than other accused given their significant responsibilities as President and Deputy President of Kenya.[8] While the two leaders would not be detained during the course of their trials and would only have to appear before the Court during trial hearings, the AU warned that the ICC could not expect a sitting Head or Deputy Head of State to travel to The Hague on a weekly or monthly basis. In its view, allowing Kenyatta and Ruto to choose the sessions that they wished to attend formed a pragmatic solution to ensure that the governance of Kenya would not be impeded by the ICC.

From a legal point of view, these 'excusal requests' for Kenyatta and Ruto raised questions for the Court's judges about the discretion of the Trial Chamber to waive the presence requirement of the accused and about the principle of equality. Firstly, is the Trial Chamber permitted under Article 63(1) or any other provision of the Statute to excuse an accused from having to attend trial hearings? And if so, under what conditions can an excusal be granted? Secondly, if the Trial Chamber would enjoy a certain level of discretion to waive the duty of the accused to be present at trial, could an accused be excused because of his or her demanding functions as sitting Head of State or would this be prohibited by Article 27(1)?

When the Defence filed an excusal request for Ruto (in April 2013) and later for Kenyatta (in September 2013), these questions about the interpretation and application of Articles 63(1) and 27(1) came to occupy the Court and its states parties for almost a year (for a brief chronology of the

a defendant refuses to appear in court, his or her trial may continue under certain conditions (as regulated, for example, in Article 63(2) of the Rome Statute). With respect to the practice of international courts, it should further be noted that the Special Tribunal for Lebanon (Article 22) is the only active international court (or hybrid tribunal) that allows for trials *in absentia*. See generally Wayne Jordash and Tim Parker, 'Trials in Absentia at the Special Tribunal for Lebanon - Incompatibility with International Human Rights Law' (2010) 8 *Journal of International Criminal Justice* 487-509.

[8] AU, Letter to the ICC, BC/U/1657.09.13, 10 September 2013 ('on behalf of the African Union, we would like to request the Court … to allow the Head of State of Kenya and his Deputy to choose the sessions they wish to attend in accordance with their constitutional obligations and duties that they are required to fulfil and for which they are accountable to the people who elected them').

proceedings, see table 5.1). In first instance, these questions were strictly a concern for the judges of the two Trial Chambers that were in charge of their trials. Yet, after the Appeals Chamber ordered the Trial Chambers to limit excusals to a minimum, and the Security Council rejected the AU's deferral request, presence at trial also became a topic on the agenda of the Assembly of States Parties. During the ASP's meeting in late 2013, the AU reiterated its position that the unprecedented situation of having a sitting Head of State and his Deputy on trial required flexibility from the Court to ensure that the official responsibilities of the two Kenyan leaders would not be compromised.[9] If this flexibility could not be realized under the existing provisions of the Statute, then the ASP would have to amend these provisions and develop a special excusal regime for sitting Heads of State and other senior government officials.

This chapter examines how the Court and its states parties have responded to the AU's claim that sitting Heads of State like Kenyatta and Ruto should be treated differently than other accused because of their official responsibilities. In what ways did the Court's judges and the ASP respond to the excusal requests for the two Kenyan leaders, and in turn to the AU's proposals to revise the rules on presence at trial? How did they try to accommodate the AU's concerns, and did they do so in accordance with the relevant provisions of the Statute, and in particular with Articles 63(1) and 27(1)?

In exploring the relevant proceedings, this chapter draws a distinction between the decisions that the two Trial Chambers and the Appeals Chamber took before the meeting of the ASP (*stage 1*) and the decisions that were taken after this meeting (*stage 2*). Parts I and II summarize the initial decisions of the two Trial Chambers to the excusal requests of Kenyatta and Ruto, as well as the revised response of the Appeals Chamber. The key issue in this first stage of the proceedings was the basis and scope of the alleged discretion of the Trial Chamber under Article 63(1). Does the Trial Chamber have this discretion under the Statute, and if so, under what conditions could an excusal be granted? After explaining the different arguments of the defence, the prosecution and the Court's judges, part III

[9] ASP, General Debate Twelfth Session, 20-26 November 2013, statement of Uganda (on behalf of the AU).

assesses whether the Appeal Chamber's interpretation of Article 63(1) is convincing from a legal point of view.[10]

Parts IV and V turn to the discussions in the ASP, and look at the second stage of the proceedings on presence at trial. In this stage the proceedings focussed on the application of a new set of rules on presence at trial. These new rules were adopted by the Court's states parties by way of an amendment to Rule 134 of the Rules of Procedure and Evidence (RPE). Part IV summarizes the negotiations during the ASP and part V introduces the different views of the defence, the prosecution and the judges of the Trial Chamber on the new rules. Finally, part VI assesses whether these new rules, as interpreted and applied by the Trial Chamber, are in conformity with Article 63(1) and the equal treatment principle that is embedded in Article 27(1). In short, to what extent are the responses of the ASP and the Court's judges to the AU's concerns about the trials of Kenyatta and Ruto based on a convincing interpretation of the Court's legal framework?

[10] As explained in chapter 1, judgments of the Appeals Chamber may be perceived as 'authoritative', but they are not legally binding for future decisions of the Pre-Trial or Trial Chamber. As a subsidiary tool for the purposes of interpretation, Article 21(2) does not make a distinction between the jurisprudence of the Pre-Trial, Trial or Appeals Chamber of the Court. In the absence of a hierarchical formulation between the decisions of the different chambers, the Court's judges are free to deviate from the views of the Appeals Chamber and may adopt an interpretation of a Pre-Trial or Trial Chamber that has been rejected by the Appeals Chamber *in an earlier and different case.* There is only one exception to this general rule and that is that the *Pre-Trial Chamber or Trial Chamber is bound by a ruling of the Appeals Chamber that is issued in the same case*. See also parts III and VI in this chapter.

Table 5.1 – Overview Proceedings on Presence at Trial

Stage 1 - Initial and Revised Responses of the Court		
When?	*Who?*	*What?*
9 April 2013	Kenyatta and Ruto	Inauguration as President and Deputy President
17 April 2013	Ruto	Asks for excusal
18 June 2013	Trial Chamber V(A)	Grants Ruto's request
10 September 2013	AU Chairpersons	Request that Kenyatta and Ruto can choose the sessions they wish to attend
23 September 2013	Kenyatta	Asks for excusal
18 October 2013	Trial Chamber V(B)	Grants Kenyatta's request
25 October 2013	Appeals Chamber	- Reverses decision Trial Chamber V(A) on Ruto's request - Sets stricter conditions for excusals
26 November 2013	Trial Chamber V(B)	Vacates Kenyatta's initial excusal
Stage 2 - New Rules on Presence at Trial		
When?	*Who?*	*What?*
11 October 2013	AU Assembly	Decides, *inter alia*, that Kenyatta will not attend his trial until the concerns of the AU have been addressed.
15 November 2013	Security Council	Rejects AU's deferral bid
27 November 2013	ASP	Adopts new rules on presence at trial (Rules 134*bis*, *ter* and *quater*)
15 January 2014	Trial Chamber V(A)	Excuses Ruto on the basis of Rule 134*quater*
31 January 2014	AU Assembly	Welcomes new rules on presence at trial
2 April 2014	Trial Chamber V(A)	Rejects request OTP for leave to appeal

I. The Initial Response of the Trial Chamber

Shortly after Kenyatta and Ruto were sworn into office, the Defence team of the new Deputy President of Kenya informed the judges of Trial Chamber V(A) that their wished to waive his right to be present during trial.[11] According to the Defence, this wish amounted to a 'reasoned and practical request' in view of the unique position in which Ruto found himself, that of 'a serving Deputy Head of State seeking to balance his constitutional responsibilities … with his personal commitment to cooperate with the court … to clear his name'.[12] In its reply, the Prosecution argued, however, that the presence of the accused is a 'statutory requirement' of the trial. Moreover, the Defence would not have presented any 'cogent reasons' for why Ruto should be excused from attending his trial.[13] These competing views between the Defence and the Prosecution essentially raised two questions for the Court's judges: (A) does the Trial Chamber have any discretion to excuse an accused from having to attend his or her trial and, if so, (B) under what kind of conditions would such an excusal be a reasonable measure? [14]

[11] *Ruto and Sang* (ICC-01/09-01/11-685), Defence Request pursuant to Article 63(1) of the Rome Statute, 17 April 2013. At the time that this request was submitted, Trial Chamber V(A) still had to rule on an earlier application of the Defence requesting that Ruto could be considered present at trial, on a case-by-case basis, via video link. The Prosecution had objected to this request by arguing that Article 63(1) requires the physical presence of the accused. In its request of 17 April, the Defence referred to the election of Ruto as the reason for submitting a new application, in which the excusal request was considered the primary request for relief and the video link the alternative request. See *Ruto and Sang* (ICC-01/09-01/11-629), Joint Defence Submissions on Legal Basis for the Accused's Presence at Trial via Video Link, 28 February 2013; *Ruto and Sang* (ICC-01/09-01/11-660), Prosecution's observations on Joint Defence Submissions on Legal Basis for the Accused's Presence at Trial via Video Link, 22 March 2013.

[12] Request Defence Ruto (April 2013), para. 17. Note that the Defence stressed that Ruto did not seek 'the grant of a blanket waiver' but would undertake to attend the opening and closing of trial, judgment and all other hearings at which his attendance would be requested by the Trial Chamber (para. 10).

[13] *Ruto and Sang* (ICC-01/09-01/11-713), Prosecution's Observations on "Defence Request pursuant to Article 63 (1) of the Rome Statute", 1 May 2013, paras. 7-12.

[14] See also *Ruto and Sang* (ICC-01/09-01/11-694), Submissions of the Common Legal Representative for Victims on the Defence Request Pursuant to Article 63(1) of the Rome Statute, 22 May 2013. One of the main concerns of the Victims' Representative was that the absence of Ruto would have an extremely negative impact on how the Court is perceived, *inter*

A. Discretion Trial Chamber to excuse the accused from presence at trial?

On the first question, the Prosecution took the position that the Trial Chamber does not have any discretion under Article 63(1), or under any other provision of the Statute, to excuse the accused from being present during trial.[15] The 'plain language' of Article 63(1) would show that the presence of the accused is a 'statutory requirement' of the trial.[16] This literal interpretation would be confirmed by Article 67(1)(d), which lists presence at trial as one of the rights that the accused enjoys before the Court. Whereas Article 67(1)(d) refers to *the right* of the accused to be present at trial, Article 63(1) would impose *a duty* on the accused to attend the complete trial.[17] According to the Prosecution, this duty would not only be directed to the accused, but also to the Trial Chamber, which would have to ensure the presence of the accused in order to protect the 'integrity of the proceedings'.[18]

In addition, the Prosecution argued that a strict reading of Article 63(1) is supported by Article 63(2) and Article 61(2)(a).[19] While the later provision permits the accused to skip the confirmation during the pre-trial stage, the Prosecution submitted that Article 63(2) provides the only exception to continuous presence when the trial has commenced and that is when the Trial Chamber decides to remove the accused for repeatedly disrupting the trial. The fact that the Statute does not foresee any

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alia, because the traditional model of criminal litigation requires the presence of the accused person in the court (para. 7). In a similar vein, the Prosecutor stated that Ruto's absence 'would undoubtedly have an extremely negative impact on how the Court is perceived by the public and more importantly the victims and witnesses' (para. 11).

[15] Observations Prosecution (May 2013), para. 7.

[16] *Ibid.*

[17] *Ibid.,* para. 9. Note that the Defence contended that Article 63(1) would not impose a duty on the accused, but would entail a right that the accused may decide to waive. According to the Prosecution, however, if this interpretation were correct, 'it would have been sufficient to have the presence of the accused included only as a right in Article 67 and there would have been no need for Article 63(1) at all' (para. 9).

[18] *Ibid.,* para. 7.

[19] *Ibid.,* para. 8-9. Note that the Statute does explicitly allow the Trial Chamber to hold *ex parte* hearings to deal with specific requests (including on special measures for witnesses and on issues of national security) under Article 72(7) and Rules 57, 74, 81(2), 83, 87(2) and 88(2).

other exceptions to presence at trial would support the view that the Trial Chamber does not have any discretion to waive the presence requirement of the accused.

How did the judges of the Trial Chamber respond to this literal and partly contextual interpretation of Article 63(1) from the Prosecution?[20] In its decision on Ruto's excusal request, the Chamber agreed with the Prosecution on the point that the accused cannot simply waive the right to be present. Article 63(1) would indeed entail a duty for the accused to be present at trial. Yet, according to the Majority of the Chamber, this requirement does not impose an 'equivalent duty upon the Chamber'.[21] In contrast to the Prosecution, Judge Eboe-Osuji and Judge Fremr argued that if the drafters had wanted to make the continuous presence of the accused a procedural requirement of the trial, 'it would not have been too difficult for the provision to have been worded in [a] prohibitory model'.[22]

The Majority further contended that the interpretation of the Prosecution (and of dissenting Judge Carbuccia) would be unreasonable from a teleological point of view.[23] If Article 63(1) would place an obligation upon the Court to ensure the uninterrupted presence of the accused, this would 'not

[20] For a more detailed analysis of this decision, see Thomas Obel Hansen, 'Caressing the Big Fish? A Critique of ICC Trial Chamber V(A)'s Decision to Grant Ruto's Request for Excusal from Continuous Presence at Trial' (2013) 22 *Cardozo Journal of International and Comparative Law* 101-119.

[21] *Ruto and Sang* (ICC-01/09-01/11-777), Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, 18 June 2013, para. 43. See the discussion on the relevance of Articles 63(2) and 61(2)(a) in paras. 54-62. The Chamber contended that both provisions are 'unique and particular' in their context, and that this context does not implicate any intention on the part of the drafters to exhaust the circumstances in which a Trial Chamber may permit an accused at his or her own request to be absent during the trial.

[22] *Ibid.*, para. 43. As examples of such a prohibitory model, the Chamber referred to Rule 60(A) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (stating, *inter alia*, that an 'accused may not be tried in his absence') and section 92(1) of the Criminal Procedural (Scotland) Act of 1995 (providing, *inter alia*, that 'no part of a trial shall take place out with the presence of the accused').

[23] *Ruto and Sang* (ICC-01/09-01/11-777-Anx2), Initial decision Trial Chamber V.A. on Ruto's excusal request - Dissenting Opinion of Judge Herrera Carbuccia, 18 June 2013, para. 4. Judge Carbuccia essentially agreed with the Prosecution and argued that the presence of the accused 'is a procedural requirement, which is reflected by the word 'shall' used in Article 63(1) of the Statute, denoting a requirement and not an option'.

only foster judicial inefficiency by constraining the Chamber to stop the trial on every occasion that the accused is unable with good reasons to be present during the trial … but it [would] also hold the Court hostage to impunity by negating the power of the Chamber to proceed with the trial of the accused who deliberately absconded from his own trial'.[24]

In light of these considerations, the Majority concluded that Article 63(1) does not impose a duty on the Trial Chamber. Instead, the Chamber reasoned that 'a better construction is one that respects and comfortably accommodates the general power of the Trial Chamber to do what is fair, reasonable and just, under Article 64(6)(f)'.[25] Under this provision, rather than Article 63(1) itself, the Chamber would enjoy a residual discretion to excuse the accused, on a case-by-case basis, when 'exceptional circumstances' would make such an excusal 'reasonable'.[26]

B. When is an excusal a reasonable measure?

The second question for the Court's judges was when it would be 'reasonable' to excuse Ruto or any other accused from continuous presence at trial. In this regard, Ruto's defence team argued that an excusal would 'strike the correct balance in this unprecedented situation by allowing not only the trial but [also] the governance of Kenya to continue unimpeded'.[27] The Prosecution submitted, on the other hand, that the Defence did not present any 'cogent reasons' for why Ruto should be excused from trial, apart from arguing that the Court should somehow accommodate those occupying high office.[28] In reference to the first paragraph of Article 27(1), the Prosecution stressed that Ruto 'is not entitled to special consideration simply because of his position'.[29] While 'flexibility and pragmatism' are 'salutary

[24] *Ibid.,* para. 44.

[25] *Ibid.,* para. 47.

[26] *Ibid.,* para. 49. Article 64(6)(f) stipulates that 'in performing its functions prior to trial or during the course of a trial, the Trial Chamber … may rule on any other relevant matters'.

[27] Request Defence Ruto (April 2013), para. 2.

[28] Observations Prosecution (May 2013), para. 12.

[29] *Ibid.*

in the abstract', they should not be a basis 'for circumventing or ignoring the explicit requirements of the Statute'.[30]

Against the backdrop of these differing views, the Majority Decision sided with the Defence and reasoned that 'exceptional circumstances' include situations 'in which an accused person has important functions of an extraordinary dimension to perform'.[31] In the case at hand, the functions of the Deputy President of Kenya would meet this 'test', because under the Kenyan Constitution the Deputy President is the 'principal assistant of the President' and is authorized to fulfil various demanding functions.[32] For these reasons, the Chamber found that Ruto's day-to-day tasks as Deputy President justified a conditional excusal.

In the opinion of Judges Eboe-Osuji and Fremr, this finding would not be affected by Article 27(1), as argued by the Prosecution and by dissenting Judge Carbuccia.[33] The Majority ruled that the object of this provision is not to 'remove from the Trial Chamber all discretion to excuse an accused from continuous presence in an ongoing trial, when that excusal is recommended by the functions implicit in the office that he or she occupies'.[34] Article 27(1) would mainly be intended to align the Statute 'with the contemporary norm of international law according to which public officials are no longer entitled to immunity for violation of international criminal law'.[35] This object would not be 'offended or wholly defeated' by allowing Ruto to be excused from continuous presence at trial.[36] According to the Majority decision, such an excusal would purely be a 'matter of accommodation of the

[30] *Ibid.*

[31] Decision on Ruto's Excusal Request (June 2013), para. 49.

[32] *Ibid.,* paras. 49-51.

[33] Judge Carbuccia agreed with the Prosecution and concluded in reference to Article 27(1) that Ruto 'should not be given a different legal status on the basis of his personal position as Deputy President'. Dissenting Opinion Judge Carbuccia (June 2013), para. 7.

[34] Decision on Ruto's Excusal Request (June 2013), para. 71.

[35] *Ibid.,* para. 66.

[36] *Ibid.,* para. 71.

demanding *functions* of his office … and not merely the gratification of the dignity of his occupation of that office' (emphasis in text).[37]

The Majority concluded that in the present situation it would be reasonable to grant Ruto a conditional excusal from presence at trial.[38] As a general rule, Ruto would remain under the obligation to be present, but in light of the 'unique and particular circumstances' of his situation, he would not have to be physically present for the entire proceedings.[39] The Chamber decided that Ruto would have to attend the opening and closing statements, the delivery of the judgment and hearings in which victims would present their views and concerns in person. But apart from these hearings, Ruto would not have to be present in the courtroom.[40]

II. The Revised Response of the Appeals Chamber

Following the Majority Decision of Trial Chamber V(A), the proceedings on presence at trial continued along two tracks: (1) through a similar application from Kenyatta to Trial Chamber V(B),[41] and by way

[37] *Ibid.*

[38] With respect to the argument that an excusal could have a negative impact on the perception of the trial, the Majority argued, *inter alia*, that this is an 'unpersuasive hyperbole with no hint of empirical support' and that 'purely as a matter of perceptions, it is difficult to see how excusal from continuous presence at trial will have an 'extremely negative impact on how the Court is perceived', when such an excusal is already permitted during the confirmation hearings'. See Decision on Ruto's Excusal Request (June 2013), paras. 72-78.

[39] *Ibid.*, para. 104.

[40] The Trial Chamber further noted that Ruto would have to be present, if applicable, during the sentencing hearings, the sentencing, victim impact hearings, reparation hearings and 'any other attendance directed by the Chamber'.

[41] *Kenyatta* (ICC-01/09-02/11-809), Defence Request for Conditional Excusal from Continuous Presence at Trial, 23 September 2013. See also *Kenyatta* (ICC-01/09-02/11-818), Prosecution's Response to the Defence Request for Conditional Excusal from Continuous Presence at Trial, 1 October 2013; *Kenyatta* (ICC-01/09-02/11-819), Victims' Response to "Defence Request for Conditional Excusal from Continuous Presence at Trial", 1 October 2013.

of (2) an appeal of the Prosecution against the decision on Ruto's excusal request.[42] Remarkably, the rulings of Trial Chamber V(B) and the Appeals Chamber on these two submissions were issued within a week of each other, without any coordination whatsoever.[43]

First, on 18 October 2013, Trial Chamber V(B) granted Kenyatta an excusal under the exact same conditions as Ruto.[44] The Majority, again composed of Judge Eboe-Osuji and Judge Fremr, who sat in both Chambers, concluded that Kenyatta's position as President would be 'all the more reason' to excuse him from continuous presence.[45] Then, only a few days later, the Appeals Chamber overturned the decision on Ruto's excusal request.[46] According to the Majority of the Appeals Chamber, the Trial

[42] *Ruto and Sang* (ICC-01/09-01/11-831), Prosecution appeal against the "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial", 29 July 2013. See also *Ruto and Sang* (ICC-01/09-01/11-817), Decision on Prosecution's Application for Leave to Appeal the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', 18 July 2013. Judge Eboe-Osuji dissented, *inter alia*, because he found 'the possibility of a risk that the Appeals Chamber may disagree with the Trial Chamber in relation to the existence of the excusal …'speculative' and insufficient to warrant the grant of leave in the terms of article 82(1)(d)'. *Ruto and Sang* (ICC-01/09-01/11-817-Anx), Dissenting Opinion Judge Eboe-Osuji, 18 July 2013, para. 13.

[43] Patricia Hobbs has highlighted that this 'lack of cooperation between the Trial and Appeals Chamber is problematic in light of the interests of judicial economy. Patricia Hobbs, 'Contemporary Challenges in Relation to the Prosecution of Senior State Officials before the International Criminal Court' (2015) 15 *International Criminal Law Review* 95.

[44] *Kenyatta* (ICC-01/09-02/11-830), Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, Trial Chamber V.B, 18 October 2013; *Kenyatta* (ICC-01/09-02/11-830-Anx2), Decision Trial Chamber V.B. on Kenyatta's excusal request - Partially Dissenting Opinion of Judge Ozaki, 18 October 2013. Judge Ozaki argued, *inter alia*, that the 'correct interpretation of Article 63(1) … is that the accused is required to be continuously and physically present at trial'. This would not be a requirement that can be waived by the Chamber, subject to 'very limited exceptions' (para. 7).

[45] Decision on Kenyatta's Excusal Request (September 2013), para. 16. The Majority of Trial Chamber V(B) rejected, however, the argument of the Prosecution that in light of the interests of judicial economy, the Trial Chamber would have to wait for the outcome of the Appeals Chamber before ruling on the excusal request of Kenyatta (paras. 58-59).

[46] Before issuing its decision, the Appeals Chamber granted the Prosecution's request for suspensive effect of the Trial Chamber's ruling under Rule 156(5). See *Ruto and Sang* (ICC-01/09-01/11-862), Decision on request for suspensive effect, 20 August 2013. For a critical discussion of this decision, see William A. Schabas, 'Attendance at Trial and the Kenya Cases Before the International Criminal Court', *Human Rights Doctorate*, 21 August 2013. Despite the Appeals Chamber's provisional ruling, the Trial Chamber did permit Ruto to return to Kenya after the Westgate Mall Attack. The Trial Chamber

Chamber did have the discretion to waive the presence requirement of the accused, but this judicial discretion would not have been exercised properly by the Trial Chamber when it excused Ruto from almost all trial hearings.[47] Finally, Trial Chamber V(B) agreed a few weeks later to vacate the excusal for Kenyatta.[48] In this way, the Appeals Chamber *de facto* revised the initial decision on Ruto's as well the decision on Kenyatta's excusal request.

A. The Appeals Chamber's response to the Prosecution

When looking at the reasoning of the Appeals Chamber, the first thing that stands out is that the Majority disagreed not only with the Trial Chamber but also with the Prosecution. While reversing the decision of the Trial Chamber, the Appeals Chamber found (by a 3-2 majority) that the Prosecution's literal interpretation of Article 63(1) was 'unduly rigid' in light of the provision's 'rationale' and 'the complex

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adjourned the trial, because it would not have any discretion to excuse Ruto from presence in light of the Appeals Chamber's decision to grant suspensive effect. See *Ruto and Sang* (ICC-01/09-01/11-T-37-Red-ENG), Public Court Records, 23 September 2013, pp. 8-9. A subsequent request of Ruto for a reconsideration of the suspensive effect was rejected by the Appeals Chamber. See *Ruto and Sang* (ICC-01/09-01/11-993-Red), Decision on Mr Ruto's request for reconsideration of the "Decision on the request for suspensive effect", 27 September 2013.

[47] *Ruto and Sang* (ICC-01/09-01/11-1066), Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial", 25 October 2013. *Ruto and Sang* (ICC-01/09-01/11-1066-Anx), Judgment Appeals Chamber on Presence at Trial - Joint Separate Opinion of Judge Erkki Kourula and Judge Anita Usacka, 25 October 2013.

[48] *Kenyatta* (ICC-01/09-02/11-837), Prosecution's motion for reconsideration of the "Decision on Defence request for conditional excusal from continuous presence at trial" and in the alternative, application for leave to appeal, 28 October 2013; *Kenyatta* (ICC-01/09-02/11-863), Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, 26 November 2013. Judge Eboe-Osuji dissented, because in his opinion the Trial Chamber should 'seize the Appeals Chamber … in order to give them an opportunity to resolve certain questions arising from their decision', especially about whether the Appeals Chamber 'obscured settled law and practice as regards when and how the Appeals Chamber may interfere with a primary Chamber's exercise of discretion'. See *Kenyatta* (ICC-01/09-02/11-863-Anx), Dissenting Opinion of Judge Eboe-Osuji, 26 November 2013. Note that by the time that the Trial Chamber vacated the excusal requests of Kenyatta, the Chamber had already adjourned the commencement of Kenyatta's trial until 5 February 2014. See *Kenyatta* (ICC-01/09-02/11-847), Decision adjourning the commencement of trial, 31 October 2013.

nature of trials of international crimes'.[49] Except for Judges Kourula and Usacka, who took a different stand in their joint separate opinion, the Appeals Chamber found that the Trial Chamber requires 'a measure of flexibility in the management of proceedings, because in the course of 'prolonged criminal proceedings, unforeseen circumstances may arise, necessitating the absence of the accused person on a temporary basis'.[50] The Majority further noted that the 'interests of justice and the psychological well-being of witnesses would not be best served if the trial had to be automatically adjourned in each such instance'.[51]

According to the Appeals Chamber, the Trial Chamber enjoys discretion under Article 63(1) to excuse the accused from continuous presence at trial, rather than under Article 64(6)(F), as envisioned by the two Trial Chambers. This would follow from Article 63(2) and from the drafting history of the Rome Statute. First of all, the fact that Article 63(2) allows the Trial Chamber to excuse a disruptive accused *'against his will'* would imply that the Trial Chamber also has the discretion to make a less drastic exception to continuous presence when the accused '*voluntarily* waives his or her right to be present' (emphasis in the judgment).[52] In other words, who can do more can also do less.

Secondly, the Appeals Chamber argued that this contextual interpretation is confirmed by the rationale of Article 63(1), which can be derived from the discussions that the drafters of the Statute had on the possibility of holding trials *in absentia*. According to the Majority, Article 63(1) was adopted 'to preclude this possibility' and its rationale would therefore be 'to reinforce the right of the accused to be present at his or her trial'.[53] This rationale does not rule out that the Trial Chamber has the discretion to excuse the accused from continuous presence at trial, or in the wording of the Appeals Chamber: Article

[49] Judgment Appeals Chamber on Presence at Trial (October 2013), para. 50.

[50] *Ibid.*

[51] *Ibid.*

[52] *Ibid.*, para. 51.

[53] *Ibid.*, paras. 53-54.

63(1) does not operate 'as an absolute bar in all circumstances to the continuation of trial proceedings in the absence of the accused'.[54]

The Majority of the Appeals Chamber did not only reject the Prosecution's literal interpretation of Article 63(1), but also the Prosecution's second ground of appeal. According to the Prosecution, the Trial Chamber had excused Ruto on the basis of his 'important functions', which would be prohibited under Article 27(1). In the opinion of the Majority, however, 'the 'test' that the Trial Chamber had developed under Article 64(6)(f) to assess whether it would be reasonable to excuse Ruto was not premised on Ruto's important functions, 'but on the more general requirement of exceptional circumstances'.[55] Without explaining what this general requirement entails, the Appeals Chamber simply concluded that it was not necessary to determine whether an excusal could be recommended by the demanding functions of the accused.

B. The Appeals Chamber's response to the Trial Chamber

While rejecting both grounds of the Prosecution's appeal, the Appeals Chamber did not accept the reasoning of the Trial Chamber. The Appeals Chamber rejected the legal basis of the Chamber's discretion (Article 63 versus 64(6)(f)) and opposed the manner in which the Chamber had exercised its excusal powers. According to the Appeals Chamber, the Trial Chamber had interpreted 'the scope of its discretion too broadly'.[56] By allowing Ruto to be absent from most trial hearings, the Chamber would have granted him 'a blanket excusal before the trial [had] commenced, effectively making his absence the general rule and his presence the exception'.[57]

To avoid another blanket excusal by the Trial Chamber, the Appeals Chamber identified six conditions that the Trial Chamber would have to respect in exercising its discretion to excuse an accused

[54] *Ibid.*, para. 55.

[55] *Ibid.*, para. 58. This interpretation of the Trial Chamber's decision is problematic, because Trial Chamber V(A) did make an assessment on the scope of Article 27(1) as discussed in Part I(B) of this chapter (see paras. 69-71 of the decision).

[56] Judgment Appeals Chamber on Presence at Trial (October 2013), para. 63.

[57] *Ibid.*

from continuous presence at trial.[58] Firstly, absences of the accused should only be allowed (1) 'in exceptional circumstances and must not become the rule'.[59] Secondly, the Trial Chamber should consider (2) 'reasonable alternative measures', including, but not limited to, 'changes to the trial schedule or a short adjournment of the trial'.[60] An excusal should only be permitted, if such alternative measures would be inadequate and even then, absences of the accused would always have to be (3) 'limited to what is strictly necessary' and should only be granted (4) when the accused has explicitly waived his or her right to be present' and when (5) 'the rights of the accused [are] fully ensured, in particular through representation by counsel'.[61] Finally, the Appeals Chamber noted that the decisions of the Trial Chamber on the presence of the accused should always be taken (6) 'on a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend'.[62]

With these six conditions, the Appeals Chamber directed the Trial Chamber to limit the use of its excusal powers to a minimum. Despite the calls from the AU and the *amicus curiae* observations of several African states to uphold the initial decision of the Trial Chamber, the Appeals Chamber firmly rejected the idea that Article 63(1) should be interpreted 'in a broad and flexible manner' to accommodate the official responsibilities of a sitting Head or Deputy Head of State.[63]

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[58] According to the Appeals Chamber (para. 61), these conditions derived from Article 63(2), which lists more or less the same conditions for the exercise of the Trial Chamber's power to remove a disruptive accused. *Contra* William A. Schabas, 'Appeals Chamber rules on Presence of Kenyan Leaders during Trial', *Human Rights Doctorate,* 26 October 2013 (arguing that it is a 'mystery' from where the Appeals Chamber derived the six conditions); Manisuli Ssenyonjo, 'Analysing the Impact of the International Criminal Court Investigations and Prosecutions of Kenya's Serving Senior State Officials' (2014) 1 *State Practice and International Law Journal* 28 (claiming that the Appeals Chamber 'did not provide any recognised source of law … for the limitations on the exercise of judges' discretion').

[59] Judgment Appeals Chamber on Presence at Trial (October 2013), para. 62.

[60] *Ibid.*

[61] *Ibid.*

[62] *Ibid.*

[63] *Ruto and Sang* (ICC-01/09/01/11-948), Joint Amicus curiae Observations of the United Republic of Tanzania, Republic of Rwanda, Republic of Burundi, State of Eritrea and Republic of Uganda on the Prosecution's appeal against the "Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial", 17 September 2013, para. 2. See the response of the

III. An Authoritative Misinterpretation?

Within the legal framework of the ICC, judgments of the Appeals Chamber offer authoritative interpretations in the sense that they provide guidance for future rulings on similar questions.[64] Under the Rome Statute, and specifically Article 21(2), jurisprudence of the Appeals Chamber is not a binding source of law. As a subsidiary tool for the purposes of interpretation, Article 21(2) does not make a distinction between the jurisprudence of the Pre-Trial, Trial or Appeals Chamber of the Court. In the absence of a hierarchical formulation between the decisions of the different chambers, the Court's judges are free to deviate from the views of the Appeals Chamber and may adopt an interpretation of a Pre-Trial or Trial Chamber that has been rejected by the Appeals Chamber *in an earlier and different case.* Yet, there is one exception to this general rule and that is that the Pre-Trial Chamber or Trial Chamber is bound by a ruling of the Appeals Chamber that is issued *in the same case*. This means that the Appeals Chamber's decision on the excusal request of Ruto was binding for Trial Chamber V(A) in the Ruto case, but strictly speaking not for Trial Chamber V(B) in the Kenyatta case.

Both Trial Chamber V(A) and Trial Chamber V(B) took the Appeals Chamber's decision as authoritative. They revised the initial excusal requests for Ruto and Kenyatta in accordance with the conditions set by the Appeals Chamber. From a doctrinal perspective, however, I believe that it should

Prosecution arguing that the *amicus curiae* observations 'rely on a misinterpretation of the law [and] are supported by policy considerations extraneous to the narrow legal issue on appeal'. *Ruto and Sang* (ICC-01/09-01/11-964), Prosecution's Response to Joint Amicus curiae Observations', 20 September 2013, para. 1. Note that the request for the submission of joint *amicus curia* was granted by a Majority of the Appeals Chamber. Judge Usacka dissented because the ASP would be 'the appropriate forum for the Applicant States to address the issues outlined in their requests'. See *Ruto and Sang* (ICC-01/09-01/11-942), Decision on the requests for leave to submit observations under rule 103 of the Rules of Procedure and Evidence, 13 September 2013; *Ruto and Sang* (ICC-01/09-01/11-942-Anx), Dissenting Opinion of Judge Anita Usacka, 13 September 2013, para. 5. Also note that a similar request of Ethiopia and Nigeria to submit observations was rejected by the Appeals Chamber, because it would be repetitive. See *Ruto and Sang* (ICC-01/09-01/11-988), Second decision on the requests for leave to submit observations under rule 103 of the Rules of Procedure and Evidence, 25 September 2013; *Ruto and Sang* (ICC-01/09-01/11-988-Anx), Partly Separate Opinion of Judge Anita Usacka, 25 September 2013 (referring back to her earlier dissenting opinion).

[64] See also Reconsideration Excusal Kenyatta (November 2013), para. 12.

be questioned whether the Appeals Chamber interpretation of Article 63(1) is more convincing than the strict reading which was favoured by the Prosecution and by four of the nine judges that were involved in the proceedings at the trial and appeal level.

In contrast to the Appeals Chamber, I must agree with the Prosecution that the literal meaning of Article 63(1) is clear.[65] The ordinary meaning of the word 'shall' establishes that the presence requirement can, in principle, not be waived by the accused or by the Chamber.[66] This literal interpretation is confirmed by reading the provision in its (direct) context. Articles 63(2) and 61(2)(a) both demonstrate that exceptions to continuous presence have to be explicitly provided for in the Statute.[67] Since there are no other exceptions to Article 63(1) than the removal of a disruptive accused, the continuous presence of the accused has to be understood as a procedural requirement of the trial.

In my opinion, the counter-arguments of the Appeals Chamber do not justify a more dynamic interpretation of this provision. Firstly, the Appeals Chamber's contextual argument that Article 63(2) supports the interpretation that the Trial Chamber has the discretion to excuse the accused that voluntarily waives his or her right to be present breaks the laws of logic. An explicit and narrowly formulated exception to a rule does not imply a broader exception to that same rule. On the contrary, under international law the logical implication of a specific exception like Article 63(2) is that other exceptions to the general rule (*i.e.,* Article 63(1)) also have to be formulated in an explicit and narrow manner (*inclusio unius est exclusio alterius*).

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[65] As I discussed in 'Extraordinary Exceptions', pp. 267-270. See also Hansen, 'Request for Excusal', p. 102; Kevin Jon Heller, 'Appeals Chamber Ensures Ruto & Kenyatta Won't Cooperate with the ICC', *Opinio Juris*, 25 October 2013; Dov Jacobs, 'Ruto Required to attend ICC Trial (for the moment)', *Spreading the Jam*, 25 October 2013. *Contra* Schabas, 'Appeals Chamber rules on Presence' (arguing that 'the more flexible view adopted by the Appeals Chamber that presence at trial is a right to be exercised by the accused that can be waived is surely the correct one').

[66] Dissenting Opinion Judge Carbuccia (June 2013), para. 4; Partially Dissenting Opinion Judge Ozaki (October 2013), para. 10; Joint Separate Opinion Judge Kourula and Judge Usacka (October 2013), para. 6.

[67] Dissenting Opinion Judge Carbuccia (June 2013), para. 5; Partially Dissenting Opinion Judge Ozaki (October 2013), para. 10; Joint Separate Opinion Judge Kourula and Judge Usacka (October 2013), para. 7.

Secondly, the Appeals Chamber's teleological argument that the Prosecution's textual interpretation is 'unduly rigid', because in the course of a trial 'unforeseen circumstances' may arise that require short absences of the accused, is not compelling either.[68] According to the Majority of the Appeals Chamber, an automatic adjournment in such situations does not serve the interests of justice and the psychological well-being of witnesses, and so the Trial Chamber should have the discretion to excuse the accused in unforeseen circumstances. What the Appeals Chamber does here is to conflate the question whether the presence of the accused is a procedural requirement of the trial with the separate question whether short absences may be allowed in concrete and unforeseen circumstances. In contrast to what the Appeals Chamber suggests, the textual interpretation of Article 63(1) does not prohibit all short absences of the accused. As was pointed out by all of the four dissenting judges, short absences may be *de minimis* in the context of the overall trial and do as such not violate the presence requirement of Article 63(1).[69] The Trial Chamber would simply have to adopt a 'common sense approach', in deciding whether concrete and unforeseen circumstances like a terrorist attack,[70] a natural disaster or the passing of a relative justify a short absence instead of an adjournment of the trial.[71] During the course of this absence, the trial could continue precisely to serve the interests of justice and the psychological well-being of witnesses.

[68] Judgment Appeals Chamber on Presence at Trial (October 2013), para. 50.

[69] Dissenting Opinion Judge Carbuccia (June 2013), para. 9; Partially Dissenting Opinion Judge Ozaki (October 2013), para. 9; Joint Separate Opinion Judge Kourula and Judge Usacka, para. 3. In this regard, it may also be noted that the presence requirement of Article 63(1) does not speak of all 'trial hearings', but refers in a holistic manner to 'the trial'. Furthermore, in the course of the trials of Jean Pierre Bemba and Thomas Lubanga (who were both in custody during their trials), the Trial Chamber authorized the absence of the accused from trial on a few specific occasions (including medical reasons). As discussed in Judgment Appeals Chamber on Presence at Trial (October 2013), p. 19, fn. 94.

[70] Note the discussion of Trial Chamber V(B) on the Westgate Mall Attack, which the Majority called 'a veritable 'early warning sign' as to what is reasonable in the interpretation of Article 63(1)'. Decision on Kenyatta's Excusal Request (September 2013), paras. 62-65.

[71] Partially Dissenting Opinion Judge Ozaki (October 2013), para. 17; Joint Separate Opinion Judge Kourula and Judge Usacka (October 2013), para. 3.

Finally, the Appeals Chamber's last argument that the Prosecution's textual interpretation conflicts with the rationale of Article 63(1) must be opposed as well. As a matter of principle, there is no need to have recourse to the *travaux préparatoires*, because the ordinary meaning of Article 63(1) is clear and does not lead to a result which is manifestly absurd or unreasonable (Article 32 of the VCLT). Yet, even if the application of Article 31 VCLT were to leave its meaning ambiguous or obscure, the available reports do not indicate, as the Appeals Chamber argued, that the drafters included Article 63(1) to reinforce Article 67(1)(d) and to preclude any possibility of holding trials *in absentia*.[72]

In their separate opinion, Judges Kourula and Usacka correctly pointed out that the debate that the drafters had on the possibility of holding trials *in absentia* should be differentiated from the 'basic requirement of presence', which was actually 'the point of departure during the negotiations'.[73] Article 37 of the Draft Statute of the International Law Commission provided that 'as a general rule, the accused should be present during the trial'.[74] This rule was 'widely endorsed' by the Ad Hoc Committee in 1995.[75] In the subsequent meetings of the Preparatory Committee between 1996 and 1998, and during the Rome Conference itself, several exceptions to this general rule were proposed in order to allow for trials *in absentia* in various situations.[76] Apart from Article 63(2), however, none of these proposals was endorsed. What this shows is that Article 63(1) was not included with the specific purpose to preclude any possibility of holding trials *in absentia*. There was already agreement on presence at trial as a general rule by the time that the drafters debated the different scenarios of continuing a trial in the absence of

[72] On the drafting history of Article 63, see generally William A. Schabas, 'Article 63', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Oxford: Hart Publishing, 2008, 2nd edition), pp. 1191-1198.

[73] Joint Separate Opinion Judge Kourula and Judge Usacka (October 2013), para. 13.

[74] ILC, Draft Statute of the ICC, 22 July 1994, Article 37.

[75] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court in UNGA, A/50/PV.22,1995, 6 September 1995, para. 164-168.

[76] UN, Press Release - Trial in Absentia Among Issues Discussed by Preparatory Committee Establishment of International Criminal Court, L/2798, 16 August 1996; Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN.Doc. A/CONF.183/2, 14 April 1998, pp. 53-54; Rome Conference, Working Paper on Article 63, Doc. A/CONF.183/C.1/WGPM/L.51/Corr.1, 9 July 1998, paras. 297-298.

the accused. That most of these scenarios were rejected can only confirm the literal and contextual interpretation of Article 63(1) that the accused has to be continuously present during the course of his or her trial.

In short, the arguments of the Appeals Chamber do not, in my opinion, validate a more dynamic interpretation of Article 63(1) than the Prosecution advanced. While the Majority was right to conclude that Ruto's initial excusal was too far-reaching, the Appeals Chamber should have adopted the literal interpretation of the Prosecution and the four dissenting judges. The literal meaning of Article 63(1) is clear and is confirmed by the direct context and drafting history of this provision. The duty to be present at trial can, as a matter of principle, not be waived by the accused or by the Trial Chamber. Short term absences of the accused may be *de minimis* in the context of the overall trial, but the Trial Chamber does not enjoy a more general discretion to excuse an accused from continuous presence at trial.

IV. The Intervention of the ASP

For the AU, the revised response of the Appeals Chamber was also disappointing, but for an entirely different reason.[77] By directing the Trial Chamber to limit excusals to a minimum, the Appeals Chamber signalled that Kenyatta and Ruto would have to be present in the courtroom for a significant part of their trials. This prospect led the AU to intensify its campaign against the continuation of their trials, first of all, at the Security Council, and in second instance at the ASP.[78] According to the AU, the unprecedented situation of having a sitting Head of State and his Deputy at trial demanded flexibility, either from the Security Council by way of a deferral under Article 16 or from the Court's judges through a complete

[77] For a discussion on the AU's perception of the Appeals Chamber's judgment, see Charles Jalloh, 'Reflections on the Indictment of Sitting Heads of State and Government and Its Consequences for Peace and Stability and Reconciliation in Africa' (2014) 7 *African Journal of Legal Studies* 51-52; Kevin Jon Heller, 'Appeals Chamber Ensures Ruto & Kenyatta Won't Cooperate with the ICC'.

[78] Meanwhile, the Kenyan Parliament also approved a motion to withdraw Kenya from the Rome Statute. See generally Sara Kendall, '"UhuRuto" and Other Leviathans: the International Criminal Court and the Kenyan Political Order' (2014) 7 *African Journal of Legal Studies* 419.

excusal from presence at trial. If this flexibility could not be realized under the existing provisions of the Statute, then the ASP would have to amend these provisions and develop a special excusal regime for sitting Head of State and other senior government officials.[79]

A. New rules on presence at trial?

Three weeks after the judgment of the Appeals Chamber, the first option of the AU failed when the Security Council rejected the AU's deferral bid under Article 16 with seven votes in favour and eight abstentions. As discussed in chapter 2, the majority agreed that Article 16 was 'not applicable' in the present case and that there were 'other means available to address the legitimate concerns of Kenya'.[80] Unlike the AU's earlier deferral request for al-Bashir, however, many of the opposing states, including the US, the UK and France, did express sympathy for the position of the AU. Whereas a deferral was considered a step too far, these states suggested that the ASP could amend the rules on presence at trial in such a way that Kenyatta and Ruto would not have to 'choose between mounting a vigorous legal

[79] Note that after the Appeals Chamber's judgment the Trial Chamber granted Ruto several short-term excusals before his trial was adjourned until the middle of January 2014. As a result, Ruto attended only three of ten remaining trials days in 2013. He was present on 31 October, 1 and 22 November, but was excused from attending his trial on 28 October, from 4 to 8 November and on 21 November. Each of these excusals was requested for the reason that Ruto would have to stay in Kenya so that Kenyatta could attend international meetings (*i.e.,* the Kenyan Constitution would arguably not allow the President and Deputy President to be away at the same time). The Prosecution objected to two of the excusals, because Ruto's absence during trial hearings would now become the 'rule rather than the exception'. However, the Trial Chamber unanimously accepted that Kenyatta's international meetings were of 'exceptional importance' and would justify a limited absence of Ruto. See *Ruto and Sang* (ICC-01/09-01/11-T-64-Red), Public Court Records, 1 November 2013, p. 73, lines 15-16; *Ruto and Sang* (ICC-01/09-01/11-T-66-Red), Public Court Records, 5 November 2013, p. 3, lines 14-25; *Ruto and Sang* (ICC-01/09-01/11-T-70-Red), Public Court Records, 21 November 2013, p. 7, lines 8-22.

[80] Statement of Luxembourg in UNSC, S/PV.7060, 15 November 2013.

defence, on the one hand, and continuing their jobs on the other'.[81] This suggestion set the stage for the annual meeting of the ASP, which took place five days after the final vote in the Security Council.[82]

At the ASP, the AU and the present African states called upon the Court's states parties to amend a number of provisions of the Statute and the RPE in light of their concerns about the prosecution of African leaders in general, and about the trials of Kenyatta and Ruto in particular.[83] Apart from amending Article 16,[84] the AU asked the ASP to revise Articles 27 and 63, as well as the Rules of Procedure and Evidence on presence at trial.[85] These amendments would have to ensure, on the one hand, that the Court's ongoing trials would not hamper Kenyatta and Ruto in the exercise of their public duties, and

[81] *Ibid.*, statement of the US. See also the statements of Argentina, France, Luxembourg and the UK.

[82] Before the opening of the ASP reports indicated that Ruto would personally lead the Kenyan delegation to the ASP. In response to these reports, the Prosecution and the Victim's Representative asked the Trial Chamber to reconsider Ruto's excusal for 21 November 2013 (*i.e.*, the second day of the ASP). See *Ruto and Sang* (ICC-01/09-01/11-1104), Prosecution's Request for provision of further information and Reconsideration of the excusal of William Ruto, 19 November 2013; *Ruto and Sang* (ICC-01/09-01/11-1111), Common Legal Representative Response to the Prosecution's Request for Provision of Further Information and Reconsideration of the Excusal of William Ruto, 20 November 2013; *Ruto and Sang* (ICC-01/09-01/11-1109), Defence Response to the Prosecution's Request for provision of further information and Reconsideration of the excusal of William Ruto, 20 November 2013. Eventually, it turned out that Ruto would not lead the Kenyan delegation, making the request for reconsideration moot. See the discussion in court: *Ruto and Sang* (ICC-01/09-01/11-T-70-Red), Public Court Records, 21 November 2013, pp. 5-14.

[83] See the statements of Botswana ('through the proposed Amendments, we hope that greater flexibility can be applied in the interpretation and application of Article 63'), Congo, DRC, Gambia, Ghana, Kenya, Ivory Coast, Namibia, Nigeria, Seychelles, South Africa, Tanzania, Tunisia and Uganda (on behalf of the AU) in ASP, General Debate of the Twelfth Session, 20-26 November 2013.

[84] On the proposed amendment to Article 16, see chapter 2, part IV.

[85] See AU Assembly, Decision October 2013, para. 10(VI); UN Treaties Collection (C.N.1026.2013.TREATIES-XVIII.10), Kenya: Proposal of Amendments, 14 March 2014. Note that the Kenyan delegation also proposed an amendment to the Preamble of the Statute, which would add a clause on the complementarity of the ICC to regional criminal jurisdiction. See generally Abel S. Knottnerus and Eefje de Volder, 'International Criminal Justice and the early formation of an African Criminal Court', in Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (eds.), *Africa and the ICC: Perceptions of Justice* (Cambridge: Cambridge University Press, 2016), pp. 376-406. For an overview of the different proposed amendments, see annex II.

on the other hand, that in the future 'serving Heads of State, their deputies and anybody acting or entitled to act as such may be exempt from prosecution during their current term of office'.[86]

In response to the AU's concerns about the trials of Kenyatta and Ruto, many delegations noted during their opening statements to the ASP that a rift was growing between the AU and the ICC and that there was now 'a very real possibility that a significant number of parties to the Rome Statute … [would] leave the Court if their concerns are not addressed'.[87] The 'most critical job' for the ASP would be to engage in a 'constructive and transparent dialogue' with the African states.[88] Several delegations stressed that key principles of the Statute, including the equal treatment principle, should be protected,[89] but it was generally agreed that the concerns of the AU should be considered seriously in order to prevent a further deterioration of the already tensed relationship between Africa and the ICC.

An important step towards a compromise between the members of the ASP was taken on the second day of the meeting during a special segment on 'the indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation'.[90] Disappointing for the AU

[86] As quoted from the proposed amendment to Article 27.

[87] Statement of New Zealand in ASP, General Debate of the Twelfth Session, 20-26 November 2013. See also the statements of Australia, Austria, Brazil, Canada, Costa Rica, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Japan, Jordan (also on behalf of Liechtenstein), Lithuania (on behalf of the EU), Luxembourg, Peru, Philippines, Portugal, Spain, Trinidad & Tobago, the UK and the US (as an observer state).

[88] *Ibid.*, statements of Australia and Brazil.

[89] *Ibid.*, see, for example, the statements of Austria ('in order to fight impunity for such serious crimes it is essential that the law applies equally to all persons without distinction based on official capacity'), Czech Republic, Finland '(at the very core of the Rome Statute is the principle that it applies equally to all persons without any distinction based on official capacity'), France, Hungary, Italy, Lithuania (on behalf of the EU - 'this is a fundamental principle that underpins the Court's work to end impunity for the perpetrators of the most serious crimes'), Spain and the UK.

[90] ASP, Special Segment as requested by the African Union: 'Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation' - Informal summary by the Moderator, ICC-ASP/12/61, 27 November 2013. On the background and structure of the special segment, see ASP, Recommendation by the Bureau for the Inclusion of an additional item in the agenda of the twelfth session of the ASP, ICC-ASP/12/1/Add.2, 18 November 2013. See also part III

was that this segment concluded, according to the informal summary of the Moderator, that 'any substantive change to the Rome Statute was unlikely to materialize in the near future'.[91] The amendments that the AU proposed to the Statute, especially on Article 27, were considered too drastic by the majority of the states parties.[92] Moreover, it was stressed that these amendments would not offer an immediate solution for the trials of Kenyatta and Ruto, given that they would only enter into force one year after seven-eighths of the states would have ratified these amendments (Article 121(4) of the Statute).[93] The segment, however, also showed 'broad agreement' that 'practical solutions' needed to be found for the 'concerns expressed by the [AU]'.[94] It was agreed that this could best be done by amending the RPE on presence at trial. This would be an acceptable course of action for most states parties and, contrary to amendments to the Statute, these changes would enter into force immediately in accordance with Article 51(2) of the Statute.[95]

B. Rules 134bis, 134ter and 134quater

After a week of intense negotiations on the details of the proposed amendments, the ASP adopted three new rules on presence at trial (see table 5.2).[96] The first amendment is Rule 134*bis*, which allows defendants to be present through the use of video technology. The possibility of trial 'by skype' was

in chapter 3 of this book, and the presentation of Charles Jalloh to the Special Segment, as summarized in 'Reflections on the Indictment of Sitting Heads of State', 43-59.

[91] ASP, Informal summary by the Moderator, para. 8.

[92] For a discussion of this proposal, see Jalloh, Reflections on the Indictment of Sitting Heads of State, 56-59.

[93] These amendments could also not be formally considered by the ASP, as they were not submitted three months in advance of the session, in accordance with Article 121(2).

[94] ASP, Informal summary by the Moderator, para. 8.

[95] The relevant part of Article 51(2) provides that amendments to the Rules 'shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties'.

[96] ASP, Resolution ICC-ASP/12/Res.7, 27 November 2013.

initially opposed by the Prosecution,[97] and was deemed *ultra vires* by several commentators,[98] because Article 63(1) would demand the physical presence of the accused. Yet, on the initiative of the UK, and in response to the concerns of the AU about the trials of Kenyatta and Ruto, the ASP agreed that the Trial Chamber should be able to decide on a case-by-case basis that parts of a trial could proceed in the virtual presence of the accused.[99]

The second amendment that the ASP adopted, copied the Appeals Chamber judgment on presence at trial and turned (part of) its jurisprudence into a binding source of law. Rule 134*ter* provides that the accused who is subject to a summons to appear may submit a written request 'to be excused and to be represented by counsel only during part or parts of his trial'. This request will have to be granted, on a case-by-case-basis, under the exact same conditions that were set by the Appeals Chamber.

The last and most controversial amendment that the ASP agreed upon is Rule 134*quater*, creating what the AU demanded: a special excusal regime for those who are 'mandated to fulfil extraordinary public duties at the highest national level'. This new provision stipulates that the Chamber will 'expeditiously consider a request of the accused who fulfils such extraordinary public duties and stresses that this request 'shall' be granted (1) 'if alternative measures are inadequate, (2) when the Chamber determines that an excusal is 'in the interests of justice' and (3) if 'the rights of the accused are fully ensured'. The second paragraph adds that a decision under this Rule 'shall be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time'.

What makes this last amendment the most controversial one is that it appears to deviate from the conditions that the Appeals Chamber formulated. In contrast to Rule 134*ter*, Rule 134*quater* does not explicitly require (1) that the absence of the accused must not become the rule, (2) that excusals

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[97] *Ruto and Sang* (ICC-01/09-01/11-660), Prosecution's observations on Joint Defence Submissions on Legal Basis for the Accused's Presence at Trial via Video Link, 22 March 2013.

[98] Kevin Jon Heller, 'Can the ASP Permit Trial by Skype?', *Opinio Juris,* 19 November 2013; Kevin Jon Heller, 'Proposals for RPE 134 - and an Unsuccessful Defence of Trial by Skype', *Opinio Juris,* 20 November 2013.

[99] Statement of UK in ASP, General Debate of the Twelfth Session, 20-26 November 2013. According to some commentators this rule is invalid under the Statute, see Ssenyonjo, 'Prosecutions of Kenya's Serving Senior State Officials', 30.

must be limited to what is strictly necessary, or (3) that excusal decisions should be taken on a case-by-case basis. It is because of these apparent differences with the Appeals Chamber's authoritative interpretation of Article 63(1) that several commentators, such as Kevin Jon Heller, immediately questioned whether this Rule would survive judicial review.[100] After all, Article 51(4) of the Statute provides that the RPE and any amendments thereto 'shall be consistent with' the Statute.

Despite the possibility that Rule 134*quater* would be deemed invalid by the Court's judges, the new excusal regime was welcomed as a 'big win' by Kenya and the AU.[101] According to the Kenyan Foreign Minister, Rule 134*quater* implied that the Court's judges could no longer pretend that Kenyatta and Ruto would 'merely [be] accused persons before the ICC'.[102] Among the other delegations of the ASP, the general feeling was one of relief. Many states parties were convinced that the new rules helped to address the 'Kenyan and African Union's concerns about trial procedures, while upholding the principles of justice and accountability'.[103] According to the President of the ASP, the tension between

[100] Kevin Jon Heller, 'Will the New RPE 134 Provisions Survive Judicial Review? (Probably Not.)', *Opinio Juris*, 28 November 2013; Knottnerus, 'The Growing Rift between Africa and the ICC', 53-54; CICC, 'ICC Must Defended from Political Interference', 28 November 2013. See also Hobbs, Contemporary Challenges, 94; Gilbert Bitti, 'Article 21 and the Hierarchy of Sources of Law before the ICC, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), pp. 417-418; Gudrun Hochmayr, 'Applicable Law in Practice and Theory - Interpreting Article 21of the ICC Statute' (2014) 12 *Journal of International Criminal Justice* 659; Ssenyonjo, 'Prosecutions of Kenya's Serving Senior State Officials', 30-33.

[101] As quoted in Robert Nyasato, 'Kenya lauds AU support in reviewing ICC rules', *Standard Media*, 29 November 2013.

[102] *Ibid.* Note that the AU Assembly welcomed the new rules on presence at trial in its next decision on the ICC. AU Assembly, Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court, Assembly/AU/Dec.493 (XXII), 30-31 January 2014, para. 10.

[103] Mark Simmonds (Foreign Office Minister UK), 'FCO Minister welcomes new ICC rules on attendance in person', *Foreign & Commonwealth Office*, 28 November 2013. See also Samantha Power (US Permanent Representative to the UN), 'Statement on the ICC Assembly of States Parties' Decision on Kenya', 27 November 2013.

presence at trial and official responsibilities was dispelled without undermining 'the principle that no one is above the law within the Roe Statute'.[104]

V. The Application of the New Rules on Presence at Trial

Almost immediately after the eventful meeting of the ASP, Ruto asked for an excusal under the new rules on presence at trial, and more specifically under Rule 134*quater*.[105] In its submission of 16 December, his Defence Team argued that Rule 134*quater* allowed the Trial Chamber to excuse Ruto from all trials hearings for as long as he would maintain the office of Deputy President of Kenya.[106] In support, the Defence contended that the amendment meaningfully omits a restriction to the duration of an excusal.[107] Accordingly, Rule 134*quater* would enable the judges of the Trial Chamber to look past the judgment of the Appeals Chamber and effectively return to their initial response to Ruto's excusal request.

[104] ASP, Closing Remarks, the President of the Assembly of States Parties, Ambassador Tiina Intelmann, Twelfth Session of the ASP, 28 November 2013.

[105] Note that following the adjournment of Kenyatta's trial until February 2014, Trial Chamber V(B) decided once more to adjourn the trial of Kenyatta until 7 October 2014 for 'the specific purpose of providing an opportunity for compliance by the Kenyan Government with the outstanding cooperation request'. *Kenyatta* (ICC-01/09-02/11-908), Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, 31 March 2014, para. 2.

[106] *Ruto and Sang* (ICC-01/09-01/11-1124), Defence Request pursuant to Article 63(1) of the Rome Statute and Rule 134*quater* of the Rules of Procedure and Evidence to excuse Mr. William Samoei Ruto from attendance at trial, 16 December 2013, para. 29. See also *Ruto and Sang* (ICC-01/09-01/11-1127), Sang Defence response to the request pursuant to article 63(1) of the Rome Statute and rule 134quarter of the Rules of Procedure and Evidence to excuse Mr. William Samoei Ruto from attendance at trial, and the Office of the Prosecutor's Application, 19 December 2013 (expressing support for Ruto's request).

[107] Defence Request (December 2013), para. 11.

A. The Prosecution's response

In response to Ruto's application, the Prosecution submitted that if Rule 134*quater* were to be interpreted in the way that the Defence suggested, this Rule would be inconsistent with Article 63(1).[108] The Prosecution did not challenge the validity of the amendment under the Statute as such, but questioned the validity of Ruto's interpretation of Rule 134*quater*. The Prosecution claimed that the new Rule and any interpretation thereof could not 'overrule the Appeals Chamber's interpretation' of the Statute.[109] In applying Rule 134*quater*, the Trial Chamber would have to respect all the conditions that the Appeals Chamber had formulated for the exercise of the judicial discretion under Article 63(1) to excuse an accused from continuous presence at trial, including that an excusal must be limited to what is strictly necessary. Given that the Defence requested the same kind of 'blanket excusal' that the Appeals Chamber had reversed, the Trial Chamber would have no choice but to decline Ruto's application under Rule 134*quater*.[110]

In addition, the Prosecution contended that Ruto's updated excusal request would be inconsistent with the equal treatment principle, laid down in the first paragraph of Article 27(1) as well as in Article 21(3).[111] According to the Prosecution, the Statute does not allow for preferential treatment based on the official capacity of the accused, including that of the office of the Deputy President of Kenya. If Rule 134*quater* would allow the accused to miss all trial hearings for as long as he or she is in office, this provision would 'create a regime under which two accused seeking the same relief …

[108] *Ruto and Sang* (ICC-01/09-01/11-1135), Prosecution response to Defence request pursuant to Article 63(1) and Rule134*quater* for excusal from attendance at trial for William Samoei Ruto, 8 January 2014, para. 2. See also *Ruto and Sang* (ICC-01/09-01/11-1139), Response of the Common Legal Representative for Victims to the Defence Request Pursuant to Article 63(1) of the Rome Statute and Rule 134*quater* of the Rules of Procedure and Evidence to Excuse Mr. William Samoei Ruto from Attendance at Trial, 9 January 2014.

[109] *Ibid.*, para. 30.

[110] *Ibid.*, para. 38.

[111] In this regard, Article 21(3) protects against 'adverse distinction founded on groups such as gender …, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status'.

would be treated differently, based only on official capacity'.[112] While the 'regular' accused would have to make case-by-case requests for an excusal under Rule 134*ter*, the 'special' accused would be allowed to request an unconditional excusal for the whole trial. In the opinion of the Prosecution, Rule 134*quater* could be consistent with the equal treatment principle, but only if: (1) the reference to extraordinary public duties would be interpreted as 'an explicitly enunciated sub-category of the 'exceptional circumstances' limb of the Appeals Chamber's six part test', and if (2) the provision would be read as emphasizing the duties of the individual and not of the office that the respective accused fulfils.[113]

Finally, a last argument of the Prosecution for why the Trial Chamber would have to reject Ruto's new application was that the Defence failed to specify Ruto's extraordinary public duties. In contrast to Rule 134*quater*, the Defence only listed 'the normal, day-to-day-duties' of the Deputy President of Kenya under the Kenyan Constitution, in the same way as the Trial Chamber had done in its initial decision on Ruto's excusal request.[114] The Prosecution claimed that this was insufficient, because dealing with the aftermath of a terrorist attack like at the Westgate Mall in Nairobi in September 2013 would qualify as an extraordinary public duty, but the 'opening of new roads or [the] welcoming [of] a foreign dignitary would not'.[115] Not every official responsibility would be an extraordinary public duty and would justify the absence of the accused during trial.

B. The Trial Chamber's decision on Rule 134quater

How did the Trial Chamber respond to the objections of the Prosecution? First of all, in addressing the claim that the Trial Chamber would have to respect the conditions of the Appeals Chamber, the Trial Chamber concluded that to interpret Rule 134*quater* in this way would 'run counter to the apparent intention' of the states parties.[116] In its view, the ASP clearly distinguished Rule 134*quater* from Rule

[112] Prosecution's Response (January 2014), para. 3.

[113] *Ibid.*, para. 34.

[114] *Ibid.*, para. 41.

[115] *Ibid.*

[116] *Ruto and Sang* (ICC-01/09-01/11-1186), Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*, 18 February 2014, para. 52.

134*ter* which lists the conditions of the Appeals Chamber. Rule 134*quater* should instead be understood as a subsequent agreement in the sense of Article 31(3)(a) of the VCLT. The Chamber concluded that the new Rule would be consistent with the Statute without the conditions of the Appeals Chamber, because as a subsequent agreement this Rule would provide 'greater clarity' on the scope and application of Article 63(1) to 'a specific type of situations' which was not 'explicitly addressed when the Statute was being drafted'.[117]

Second of all, with respect to the equal treatment principle, the Trial Chamber found that Rule 134*quater*, as interpreted by the Defence, would not raise any problems under Article 27(1). Unlike the Prosecution, the three judges concluded that the new Rule could not 'be read as limiting the criminal responsibility of those performing 'extraordinary public duties at the highest national level', nor as limiting the Court's jurisdiction over such persons'.[118] As such, Rule 134*quater* and the Defence's interpretation could not defeat or obstruct the object of Article 27(1) which would be to remove immunity from jurisdiction on the basis of official capacity.[119]

Having rejected the Prosecution's two most fundamental objections against Ruto's application under Rule 134*quater*, the Trial Chamber turned to the question when it would be reasonable to excuse Ruto from continuous presence. At this point, the Trial Chamber agreed with the Prosecution's last objection that 'not every duty at the highest national level is an extraordinary one' and that Rule 134*quater* does not allow for the unconditional excusal that the Defence asked for.[120] The Chamber reasoned that such an excusal would be contrary to the second paragraph of Rule 134*quater*, which

[117] *Ibid.*, para. 55-56.

[118] *Ibid.*, para. 61.

[119] Furthermore, the interpretation of the Defence would also be compatible with Article 21(3). According to the Chamber, the object of this provision would be to prohibit adverse distinction on the basis of a person's characteristics or status. Rule 134*quater* would not make such a distinction, because it only focusses on the 'functions which the person is mandated to perform'. *Ibid.*, para. 59. The Trial Chamber added that a provision like Article 21(3) is meant 'to prevent discrimination' and that Rule 134*quater* 'provides an objective and reasonable justification' (para. 60).

[120] *Ibid.*, para. 64.

stipulates that the subject matter of specific hearings should be considered in deciding on an excusal request, and that the continuous absence of the accused would frustrate the 'interests of justice, given the active participation of victims in the proceedings'.[121]

According to the Chamber, however, the high number of extraordinary public duties that the Deputy President of Kenya has to perform under the Kenyan Constitution would render 'a case-by-case analysis impractical'. The defendant could not be expected to prove when and why he would not be able to attend his trial due to his extraordinary public duties. The judges therefore decided to interpret the condition of extraordinary public duties in the same way as they had interpreted the condition of exceptional circumstances in their initial decision on Ruto's excusal request. They evaluated, based on the Kenyan Constitution, whether the Deputy Head of State of Kenya has to perform demanding functions on a regular basis. In this regard, the different wording of Rule 134*quater*, both in comparison to the initial decision of the Trial Chambers and with Rule 134*ter* (which refers to exceptional circumstances), would be inconsequential.

Based on these considerations, the Chamber decided that Ruto would only have to attend a number of specific hearings of his trial.[122] In addition to hearings in which victims would present their views in person, Ruto would have to be present for the closing statements, the delivery of the judgment and the first five days of hearings after a judicial recess.[123] In this way, Ruto obtained almost the exact same excusal as the Trial Chamber had initially granted to him. The six conditions of the Appeals Chamber, as codified in Rule 134*ter*, would no longer limit the Trial Chamber's excusal powers.

[121] *Ibid.*, paras. 57 and 74.

[122] *Ibid.*, paras. 63-71.

[123] *Ibid.*, para. 79.

VI. An Invalid Rule?

The Trial Chamber's application of the new rules on presence at trial raises questions about the consistency of Rule 134*quater* with the Statute. As demanded by Article 51(4), amendments to the RPE have to be in accordance with the relevant provisions of the Statute.[124] Like the ASP itself stated in 2002, in its explanatory note to the RPE, the Rules and amendments thereto 'are an instrument for the application of the Rome Statute … to which they are subordinate in all cases'.[125] In the case of Rule 134*quater*, it can be questioned whether the ASP complied with this standard, in relation to both Article 63(1) and the equal treatment principle that is embedded in the first paragraph of Article 27(1).

A. Validity under Article 63(1)

With respect to Article 63(1), it should be recalled that the Appeals Chamber's interpretation is, arguably, a *misinterpretation*. As discussed above, I believe that the meaning of Article 63(1) is clear and does not allow the Trial Chamber to excuse an accused from continuous presence at trial. For the purpose of assessing the (in)validity of Rule 134*quater,* however, I agree with the Prosecution that the Appeals Chamber's judgment is 'authoritative', in the sense that an amendment to the Rules cannot 'overrule' the Appeals Chamber's previous interpretation of Article 63(1).[126]

When the ASP revises the RPE, the presumption must be that the ASP intends these amendments to be consistent with the Statute.[127] This presumption follows from Article 51 and the ASP's explanatory note to the RPE. However, if an amendment to the Rules is shown to be inconsistent with the Appeals Chamber's interpretation of the Statute in the same case, then this presumption is rebutted and the act

[124] Article 51(5) further states that 'in the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail'.

[125] The RPE were adopted in 2002. The background of the explanatory note and the 'very strong stance of the ASP in favour of the Statute supremacy' is that the ASP was unwilling 'to allow the US to use the Rules as a tool to increase the scope of Article 98(2) … to prevent any American citizen from being surrendered to the Court'. See Bitti, 'Article 21', p. 416.

[126] Prosecution's Response (January 2014), para. 30.

[127] Bruce Broomhall, 'Article 51', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), The Rome Statute of the International Criminal Court: A Commentary (Oxford: Oxford University Press, 2002), pp. 1033-1044.

of amendment must be deemed *ultra vires* under the Statute. While the jurisprudence of the Appeals Chamber is not a binding source of law, and its rulings offer only *an* interpretation of the Statute, proving the inconsistency between the ASP's amendment to the RPE and the Appeals Chamber's earlier interpretation of the Statute in the same case overturns the *intra vires* presumption.[128] In the case at hand, the short time span between the Appeals Chamber's judgment and the adoption of the amendment (less than a month) supports the Prosecution's position that this judgment should be used as a benchmark for the application of Rule 134*quater*. Moreover, and more to the point, the Trial Chamber is bound to the Appeals Chamber's interpretation of Article 63(1) in the Ruto case.

According to the Trial Chamber, Rule 134*quater* should be understood as a subsequent agreement in the sense of Article 31(3)(a) of the VCLT.[129] However, this argument mistakenly conflates an amendment to the RPE, which is regulated *within* the Statute, with a subsequent agreement, which is an agreement of *all* states parties to a treaty *outside* the legal framework of that treaty.[130] Article 51 of

[128] Another consideration in this regard is that the ASP does not have any power under the Statute to interpret its provisions. See Article 112 of this Statute which lists the powers and responsibilities of the ASP.

[129] Decision Rule 134*quater* (February 2014), para. 56.

[130] The decisions and practices of a plenary organ of an international court, like the ASP, can amount to subsequent agreements or subsequent practice. As stated in paragraph 1 of Draft Conclusion 11 of the ILC on subsequent agreements and subsequent practice in relation to the interpretation of treaties: 'Articles 31 and 32 [VCLT] apply to a treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph (3) (a) and (b) are, and other subsequent practice under article 32 may be, means of interpretation for such treaties'. That being said, as explained by Special Rapporteur Nolte, 'the possible significance of agreements between the parties [or subsequent practice] must be evaluated, in the first place, under the provisions of the constituent instrument itself and of other rules of the organization. If, for example, the constituent instrument contains a clause according to which the interpretation of the instrument is subject to a special procedure, it is to be presumed that the parties, by reaching an agreement subsequently to the conclusion of the treaty, do not wish to circumvent such procedure'. ILC Special Rapporteur Nolte, Third report on subsequent agreements and subsequent practice in relation to treaty interpretation, A/CN.4/683, 7 April 2015. Note that the Trial Chamber did not address the question whether the expressed support of the states parties for the new rules on presence at trial could be understood as a form of subsequent practice in the sense of Article 31(3)(b) of the VCLT.

the Statute clearly encapsulates the RPE and amendments thereto within the scope of the Statute. Therefore, Rule 134*quater* or any other amendment to the Rules cannot be considered a subsequent agreement. This means that if the text of a new Rule cannot be reconciled with the Statute, as interpreted in accordance with the VCLT and Article 21 of the Statute, that Rule, regardless of the intentions of the ASP, is invalid under the Statute. Otherwise, amendments to the RPE would effectively turn into amendments to the Statute, for which the drafters established a separate and more difficult procedure in Articles 121 and 122 of the Statute.[131]

For my part, I do not see how Rule 134*quater* can be reconciled with Article 63(1) as interpreted by the Appeals Chamber. With Rule 134*quater* the ASP clearly intended to establish a different excusal regime, with different conditions, for the 'special' accused that fulfils extraordinary public duties. The 'regular' accused would have to make an application under Rule 134*ter*, which repeats the conditions of the Appeals Chamber. To argue, as the Prosecution did, that the conditions of Rule 134*ter* also apply to Rule 134*quater*, makes the latter redundant, except that an application of the 'special' accused under the latter provision would have to be considered 'expeditiously'. The more probable reading is that with Rule 134*quater* the ASP tried to extend the scope of discretion under Article 63(1) as interpreted by the Appeals Chamber. Given that this not permitted under Article 51(4), I believe that the Trial Chamber had no choice but to find the new Rule to be inconsistent with Article 63(1).

B. Validity under Article 27(1)

The equal treatment principle as incorporated in the first paragraph of Article 27(1) raises an additional problem with respect to Rule 134*quater*. According to the Trial Chamber, Rule 134*quater*, as interpreted by the Defence, would not violate Article 27(1). The Chamber agreed to a restrictive interpretation of the object of Article 27, which would be to remove immunity from jurisdiction on grounds of official capacity. In my view, removing personal and functional immunity is indeed an important aim of Article 27, especially in light of Article 27(2) which stipulates that 'immunities or special procedural rules

[131] By adopting rules that seek to clarify the Statute, the ASP is 'simply avoiding the cumbersome process [of] Article 121'. Bitti, 'Article 21', p. 418.

which may attach to the official capacity of a person … shall not bar the Court from exercising its jurisdiction over such a person'. Yet, I have to agree with the Prosecution that 'the scope of Article 27(1) is broader than [this] direct context suggests'.[132]

The first sentence of Article 27(1) does not mention immunity from prosecution nor does it refer to the provision relating to criminal responsibility. It provides that '*this Statute'*, which must mean the whole Statute, 'shall apply equally without *any* distinction based on official capacity' (emphasis added). The second sentence of Article 27(1) further provides that '*in particular,* official capacity as a Head of State … shall in no case exempt a person from criminal responsibility under this Statute' (emphasis added). What this signals is that the non-exemption from criminal responsibility is an important example of non-discrimination on the basis of official capacity, but that it is not the only possible example.[133] Otherwise, the words 'in particular' would be meaningless.[134]

How does this relate back to the question of the validity of Rule 134*quater* under Article 27(1)? Does the notion of 'extraordinary public duties at the highest national level' imply a distinction on the basis of official capacity? Perhaps, as the Prosecution submitted in its response to Ruto's excusal request, such a distinction is not implied if the Trial Chamber would have focussed 'on the functions which the person [and not the office] is mandated to perform'.[135] In this way, the Trial Chamber would also have fulfilled its obligation under Article 21(3) to apply and interpret the law without any adverse

[132] Prosecution's Response (January 2014), para. 26.

[133] As pointed out by the Prosecution as well: *Ibid.,* paras. 25-27.

[134] Note that the Prosecution contended in its response to Ruto's excusal request that the first sentence of Article 27(1) 'was intended to ensure that the Court's legal framework is applied equally to all persons - be they great or small, powerful or weak, famous or obscure'. In my view, the Prosecution is absolutely right to challenge the Trial Chamber's restrictive interpretation of Article 27(1), but I am doubtful about its own reading of this provision. The Prosecution's interpretation seems to extend the scope of Article 27(1) to distinctions other than those on the basis of official capacity. In my view, the provision's heading, which speaks of the 'irrelevance of official capacity', and its first sentence, which refers to distinction 'based on official capacity', show that Article 27(1) is concerned with official capacity and not with other (adverse) distinctions, which may be covered by Article 21(3) instead.

[135] *Ibid.,* para. 59.

distinction. However, in applying Rule 134*quater* in its decision on Ruto's excusal request, the Chamber did not focus on the extraordinary public duties that Ruto bears as a person, but determined that the 'duties of the Deputy President are certainly extraordinary public duties'.[136] It simply listed the functions that the Deputy President of Kenya is authorized to fulfil under the Kenyan Constitution and concluded solely on this basis that Rule 134*quater* is applicable. By setting this standard of proof for Rule 134*quater*, the Chamber overstretched what can reasonably be understood as extraordinary. Consequently, the Chamber's interpretation of Rule 134*quater* is also inconsistent with the equal treatment principle that is included in the first paragraph of Article 27(1).

C. No leave to appeal = No final answer

Several commentators expected that the Trial Chamber's decision on Ruto's updated excusal request would only be a prelude to a judgment of the Appeals Chamber on the (in)validity of Rule 134*quater*.[137] Surprisingly, however, the Trial Chamber rejected the Prosecution's application for leave to appeal.[138] In the opinion of the Majority, this request would not fulfil the requirements of Artic 82(1)(d) of the Statute. Under this provision, a decision may only be appealed when it 'involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings'.

[136] Decision Rule 134*quater* (February 2014), para. 63.

[137] See, for example, the discussion at *Opinio Juris*, including comments of Dov Jacobs: Kevin Jon Heller, 'No, the ASP Didn't Hoodwink Kenya and the AU Concerning RPE 134*quater*, *Opinio Juris*, 14 January 2014; Kevin Jon Heller, 'Trial Chamber Conditionally Excuses Ruto from Continuous Presence', *Opinio Juris*, 17 January 2014 (saying that it is 'unlikely' that the Trial Chamber will refuse grant leave to appeal).

[138] *Ruto and Sang* (ICC-01/09-01/11-1246), Decision on 'Prosecution's application for leave to appeal the decision on excusal from presence at trial under Rule 134*quater*, 2 April 2014; *Ruto and Sang* (ICC-01/09-01/11-1246-Anx), Decision on 'Prosecution's application for leave to appeal the decision on excusal from presence at trial under Rule 134*quater* - Dissenting Opinion of Judge Olga Herrera Carbuccia, 2 April 2014.

According to the Prosecution, the Chamber's decision on Ruto's application under Rule 134*quater* raised the 'novel legal question' whether this provision, as interpreted by the Trial Chamber, is consistent with the Statute, and in particular with Articles 63(1) and 27(1).[139] This question would have to be answered through an interlocutory appeal, because if the Appeals Chamber would find that the Trial Chamber erred in law by granting a too far-reaching excusal under Rule 134*quater*, 'it may require parts of the trial not attended by Mr. Ruto to be re-heard to ensure consistency with the restrictions set down [by the Appeals Chamber in its previous judgment]'.[140]

This line of reasoning seems persuasive. If the Prosecution had pursued this issue in an appeal against Ruto's potential conviction, acquittal or sentence, which does not require leave to appeal from the Trial Chamber (Rule 154 RPE), the Appeals Chamber could have nullified a significant part of the trial proceedings in which Ruto was absent.[141] Apart from the alleged invalidity of Rule 134*quater,* the Appeals Chamber could have decided to do so because it has established that 'it is through the process of confronting the accused with the evidence [that] the fullest and most comprehensive record of the relevant events may be formed'.[142] Clearly, if the Appeals Chamber would, for this or another reason, demand the Trial Chamber to repeat hearings and thus to rehear witnesses, this would have a significant impact on the fairness and expeditious conduct of the proceedings and ultimately on the outcome of the trial in the sense of Article 82(1)(d).

Nonetheless, in the opinion the Majority of the Trial Chamber, the concerns of the Prosecution were 'highly speculative'.[143] According to Judges Eboe-Osuji and Fremr, the risk of having to repeat the hearings that Ruto did not attend 'significantly decreased' due to Appeals Chamber's 'clear recognition

[139] *Ruto and Sang* (ICC-01/09-01/11-1189), Prosecution's application for leave to appeal the decision on excusal from presence at trial under Rule 134*quater*, 24 February 2014, para. 4.

[140] *Ibid.*, para. 8.

[141] This was also the conclusion of Judge Carbuccia in his Dissenting Opinion, para. 8.

[142] Judgment Appeals Chamber on Presence at Trial (October 2013), para. 49.

[143] Decision Leave to Appeal (April 2014), para. 18.

of the Chamber's discretion to excuse [the accused] from certain hearings'.[144] This risk would become 'even more theoretical', in their opinion, if one were to consider 'the Appeals Chamber's standard of review, whereby the Appeals Chamber 'will not interfere with [another] Chamber's exercise of discretion … merely because the Appeals Chamber, if it had the power, might have made a different ruling'.[145]

What the Majority conveniently overlooked, however, is that the Prosecution's request for leave to appeal did not just concern the manner in which the Chamber exercised its discretion. The Prosecution's intended appeal, as supported by the official representative of the victims, also raised questions about the (in)validity of Rule 134*quater*.[146] By rejecting the Prosecution's request for leave to appeal, the Majority side-tracked these questions in order to bring the proceedings on Ruto's presence at trial to a close.

In this way, the Trial Chamber not only followed but also protected the intervention of the ASP. From a doctrinal point of view, the underlying argumentation of the Trial Chamber is dubious, to say the least. Yet, by rejecting the Prosecution's request for leave to appeal, the Majority of the Trial Chamber made sure that Ruto's trial would continue along the lines that the ASP envisioned when it adopted Rule 134*quater*. Given that the charges against Kenyatta were withdrawn by the Prosecution before his trial commenced,[147] the Majority decision of the Trial Chamber remains for now the last

[144] *Ibid.*

[145] *Ibid*. The Trial Chamber quoted *Kony et al* (ICC-02/04-01/05-408 (OA 3), Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under Article 19(1) of the Statute' of 10 March 2009, 16 September 2009, para. 79.

[146] *Ruto and Sang* (ICC-01/09-01/11-1193), Common Legal Representative for Victims' Response to the Prosecution's Application for Leave to Appeal the Decision on Excusal from Presence at Trial under Rule 134*quater*, 27 February 2014.

[147] *Kenyatta* (ICC-01/09-02/11-983), Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, 5 December 2014.

substantive decision on whether a sitting (Deputy) Head of State has to be present during all parts of his or her trial.[148]

VII. Conclusion: The ICC's Special Excusal Regime

This chapter examined the responses of the Court and its states parties to the AU's claim that sitting Heads of State should be treated differently than other accused in light of their official responsibilities. This claim, and especially the requests from Kenyatta and Ruto to be excused from continuous presence at trial, confronted the Court's judges with difficult questions about the discretion of the Trial Chamber to waive the presence requirement of the accused. The bottom-line of how the majority of the judges responded to these questions is that the Trial Chamber may, under a number of conditions, excuse the accused from its duty to be present at trial, in particular when the accused is a sitting Head of State and has to fulfil extraordinary public duties.

At all stages of the proceedings on the excusal requests of Kenyatta (summarized in table 5.3) and Ruto (summarized in table 5.4), the majority of the Court's judges showed flexibility with respect to the requirement of the accused to be present at trial. What the judges of the two Trial Chambers and the Appeals Chamber disagreed upon, however, are the conditions under which an excusal can be

[148] Note that following a request from the Prosecution to adjourn Kenyatta's trial until such time as Kenya fulfil its cooperation obligations towards the Court, Trial Chamber V(B) held two status conferences on 7 and 8 October 2014 to discuss 'the status of cooperation between the Prosecution and the Kenyan Government'. Prior to the two status conferences, the Chamber (with Judge Ozaki partially dissenting) rejected a request from Kenyatta under Rule 134*quater* and, in the alternative, under Rule 134*bis* to be excused from attending the second status conference. *Kenyatta* (ICC-01/09-02/11-960) Decision on Defence request for excusal from attendance at, or for adjournment of, the status conference scheduled for 8 October 2014, 30 September 2014; *Kenyatta* (ICC-01/09-02/11-960-Anx), Partially Dissenting Opinion Judge Kuniko Ozaki, 30 September 2014. For a detailed analysis of these decisions, see Abel S. Knottnerus, 'Kenyatta (finally) has to go back to The Hague', *Opinio Juris*, 1 October 2014.

granted.[149] In first instance, the two Trial Chambers excused Ruto and Kenyatta from almost all trial hearings, except for the opening statements, closing statements and the delivery of the judgment. According to Judge Eboe-Osuji and Judge Fremr, who sat in both Chambers, such an exemption would be reasonable given that Kenyatta and Ruto had to perform demanding functions as President and Deputy President of Kenya.

These far-reaching excusals had to be vacated, however, after the Appeals Chamber ruled that the Trial Chamber had granted Ruto an excusal which effectively made his absence the general rule and his presence an exception. The Appeals Chamber concluded, by majority, that the Trial Chamber could only excuse an accused from continuous presence at trial in exceptional circumstances and when a number of additional conditions are fulfilled. In this way, the Appeals Chamber foreshadowed that Kenyatta and Ruto would not have to attend all sessions, but certainly a quite significant part of their trials.

Following the decision of the Appeals Chamber, and the disappointing response of the Security Council to the AU's deferral request, African states began to pressure the ASP to amend Articles 27 and 63(1) of the Statute. These amendments would have to ensure that sitting Heads of State could be exempted from prosecution and excused from having to attend their trials. During an eventful meeting of the ASP in November 2013, many of the Court's states parties stressed that the concerns of Kenya and the AU had to be addressed in a serious manner, but a large majority proved reluctant to accept the proposed amendments to the Statute. As a compromise, the ASP decided to revise the RPE on presence at trial. Most importantly, the ASP adopted Rule 134*quater* so that the Trial Chamber would be able to excuse a sitting Head of State under more flexible conditions than the Appeals Chamber had formulated. Within a few weeks after the ASP's meeting, the Trial Chamber excused Ruto from most of his trial hearings on the basis of this new Rule. In effect, Ruto would only have to attend the opening and closing

[149] This disagreement is illustrated by the remarkable number of eight (partially) dissenting opinions and various separate (further) opinions in the proceedings on presence at trial. Generally, on the function of judicial dissenting in international criminal justice, see Hemi Mistry, 'The Paradox of Dissent - Judicial Dissent and the Projects of International Criminal Justice' (2015) 13 *Journal of International Criminal Justice* 449-474.

statements, the delivery of the judgment, and any hearings in which victims would present their views and concerns in person.

With the adoption and application of Rule 134*quater*, the Court's judges and the ASP established an excusal regime which builds on the idea that 'a flexible and pragmatic approach' towards the presence of high-level accused will 'bolster the effectiveness of the Court'.[150] Flexibility and pragmatism are what proponents of this new regime will consider its strongest features. The Court's trials can continue, with or without the presence of the accused, and sitting Heads of State can combine their trials in The Hague with their responsibilities at home.

The new rules on presence at trial do, however, raise a number of problems. Firstly, Rule 134*quater* cannot be reconciled with the text of Article 63(1). What does it mean that the accused 'shall be present during the trial', if the accused may skip most trial hearings? As established by the Appeals Chamber, the Trial Chamber has the discretion to excuse an accused in exceptional circumstances, but continuous presence should remain the rule. The adoption of Rule 134*quater* and the application of this provision by the Trial Chamber ignore this important condition that derives from the Appeals Chamber's authoritative interpretation of Article 63(1).

Secondly, the excusal that the Trial Chamber granted to Ruto on the basis of Rule 134*quater* raises the question whether the Statute is applied equally without any distinction on the basis of official capacity, when the Trial Chamber issues an excusal only because the accused has to fulfil extraordinary functions as sitting (Deputy) Head of State. In a general sense, Rule 134*quater* may perhaps be reconciled with the equal treatment principle that is embedded in Article 27(1). However, the Trial Chamber's excusal for Ruto under Rule 134*quater* is manifestly inconsistent with this important principle. Instead of focusing on the extraordinary duties that he personally has to fulfil, the Chamber

[150] Defence Request Ruto, April 2013, para. 2. See also Joint *Amicus curiae* Observations of Tanzania, Rwanda, Burundi, Eritrea and Uganda (September 2013), para. 2 ('Article 63 should be interpreted in a broad an flexible manner that encourage State cooperation in the widest possible set of circumstances and without endangering the constitutional obligations of the highest office holder').

based this excusal on the regular functions of the Deputy President of Kenya under the Kenyan Constitution. In this way, the Trial Chamber created a precedent for treating sitting (Deputy) Heads of State just a little bit less equal than other accused.

Thirdly, another weakness of the new rules on presence at trial is that by allowing the accused to be absent from large parts of the trial, these rules risk to undermine the administration of justice. As the Appeals Chamber emphasized in its judgment on presence at trial, the accused 'is not merely a passive observer of the trial, but the subject of the criminal proceedings and, as such, an active participant therein'.[151] The active participation of the accused is important not only to protect the rights of the accused, but also because it is through 'the process of confronting the accused with the evidence [that] the fullest and most comprehensive record of the relevant events may be formed'.[152] It should be questioned whether the absence of a 'busy accused' during most witness testimonies does not affect the recording of the events in which the accused may or may not have been involved.[153]

Finally, a last problem with the new rules on presence at trial, is that the adoption of Rule 134*quater* has established a precedent for adjusting decisions of the Appeals Chamber through an amendment to the RPE.[154] Of course, it falls within the prerogatives of the ASP to consider the

[151] Judgment Appeals Chamber on Presence at Trial (October 2013), para. 49.

[152] *Ibid.*

[153] A related problem which I have not extensively addressed in this chapter is that the absence of the accused during trial may have a negative impact on how the general public and especially the victims and witnesses perceive the trial. See Knottnerus, 'Extraordinary Exceptions', 285.

[154] As pointed out by Philipp Ambach the underlying problem appears to be 'that there is a general rule for lawmakers not to devise an abstract-general legal provision in order to fit the circumstances of a specific case. Such a procedure generally entails many risks, including fragmentation of the relevant legal text, possibility even its incoherence, as well as a loss of the abstract-general character constitutive of a law that is meant to apply to *any* situation regardless of specifics which have consciously been considered irrelevant for its application'. Philipp Ambach, 'A Look towards the Future - The ICC and 'Lessons Learnt'', in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), p. 1291. Similar concerns have been expressed by Jonathan O'Donohue, 'The ICC and the ASP', in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), pp. 120-122.

ramifications of the ways in which the Court interprets and applies the provisions of the Statute and the RPE. Yet, there are important reasons for why the ASP cannot amend the Statute overnight and why the RPE are subordinate to the Statute. The underlying logic is that political convenience should not determine the daily functioning of an international court. This also means that general rules should not be revised solely to fit the circumstances of a specific case, as clearly happened in the case of Rule 134*quater*.

To conclude, through its response to the AU, the Court and its states parties have developed a special excusal regime for those who fulfil demanding functions, like a sitting Head of State. In considering the formation and application of this regime, most commentators will agree that some flexibility and pragmatism may be needed when the accused has to fulfil important public duties, especially in an unpredictable situation like a terrorist attack or a natural disaster. However, with the adoption of Rule 134*quater*, the ICC's special excusal regime has gone far beyond short term absences for unanticipated situations. What Rule 134*quater* and the Trial Chamber have done, is to mistake exception (absence) for rule (presence), and to conflate the day-to-day functions of a sitting Head of State with the important public duties that an accused may have to fulfil in the context of unforeseen developments. In this way, sitting Heads of State are treated differently than other accused, not because of their official responsibilities, which cannot always be delegated, but simply because of their official status.

Table 5.2 - New Rules on Presence at Trial

Rule 134bis - Presence through the use of video technology 1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be allowed to be present through the use of video technology during part or parts of his or her trial. 2. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question.
Rule 134ter - Excusal from presence at trial 1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be excused and to be represented by counsel only during part or parts of his or her trial. 2. The Trial Chamber shall only grant the request if it is satisfied that: (a) exceptional circumstances exist to justify such an absence; (b) alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be inadequate; (c) the accused has explicitly waived his or her right to be present at the trial; and (d) the rights of the accused will be fully ensured in his or her absence. 3. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question. Any absence must be limited to what is strictly necessary and must not become the rule.
Rule 134quater- Excusal from presence at trial due to extraordinary public duties 1. An accused subject to a summons to appear who is mandated to fulfil extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and to be represented by counsel only; the request must specify that the accused explicitly waives the right to be present at the trial. 2. The Trial Chamber shall consider the request expeditiously and, if alternative measures are inadequate, shall grant the request where it determines that it is in the interests of justice and provided that the rights of the accused are fully ensured. The decision shall be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time.

Table 5.3 - Overview Proceedings on Presence at Trial in the Ruto Case

Stage 1 - Initial and Revised Responses of the Court		
When?	*Who?*	*What?*
17 April 2013	Ruto	- Asks for excusal from continuous presence at trial - OTP challenges the request (1 May 2013)
18 June 2013	Trial Chamber V(A)	- Grants Ruto's request - Judge Carbuccia dissenting - OTP's request for leave to appeal is granted (18 July), with Judge Eboe-Osuji dissenting, OTP files appeal and requests suspensive effect (29 July), which is opposed by the Defence (8 August)
August - September 2013	Appeals Chamber	- Appeals Chamber grants OTP's request for suspensive effect of excusal (20 August) - Grants request for joint *amicus curiae* from Tanzania, Rwanda, Burundi, Eritrea and Uganda, with Judge Usacka Dissenting (13 September, observations submitted on 17 September) - Rejects similar request from Ethiopia and Nigeria (25 September), with a partially separate opinion of Judge Usacka - Rejects request Ruto for reconsideration suspensive effect (27 September).
23 September 2013	Trial Chamber V(A)	- Permits Ruto to return to Kenya after the Westgate Mall Attack
25 October 2013	Appeals Chamber	- Overturns decision Trial Chamber on Ruto's excusal - Sets conditions for excusals - Joint separate opinion of Judges Kourula and Usacka
October-November 2013	Trial Chamber V(A)	- Ruto was present on 31 October, 1 and 22 November - Ruto was excused on 28 October, from 4 to 8 November and on 21 November
Stage 2 - New Rules on Presence at Trial		
When?	*Who?*	*What?*
16 December 2013	Ruto	- Request under Rule 134*quater* - OTP and Victims challenge the request (8 and 9 January 2014)
15 January 2014	Trial Chamber V(A)	Excuses Ruto on the basis of Rule 134*quater*, only has to attend certain specific hearings.
18 February 2014	Trial Chamber V(A)	- Provides reasons for excusal - Separate further opinion of Judge Eboe-Osuji - OTP requests leave to appeal (24 February) - Defence opposes OTP's request (28 February)
2 April 2014	Trial Chamber V(A)	- Rejects request OTP for leave to appeal - Judge Carbuccia dissenting

Table 5.4 - Overview Proceedings on Presence at Trial in the Kenyatta Case

Stage 1 - Initial and Revised Responses of the Court		
When?	*Who?*	*What?*
23 September 2013	Kenyatta	- Asks for excusal - OTP and Victims challenge the request (1 October)
18 October 2013	Trial Chamber V(B)	- Grants Kenyatta's request - Judge Ozaki partially dissenting - Separate further opinion of Judge Eboe-Osuji
31 October 2013	Trial Chamber V(B)	Adjourns commencement of trial until 5 February 2014
26 November 2013	Trial Chamber V(B)	- Vacates Kenyatta's initial excusal - Dissenting opinion of Judge Eboe-Osuji
Stage 2 - New Rules on Presence at Trial		
When?	*Who?*	*What?*
23 January 2014	Trial Chamber V(B)	- Vacates trial date - Concurring separate opinion of Judge Eboe-Osuji
24 January 2014	Kenyatta	- Request under Rule 134*quater* - Request withdrawn after vacating trial (27 January), and subsequently adjournment of the trial until 7 October
19 September 2014	Trial Chamber V(B)	- Vacates trial date again - Convenes two status conferences, and requires Kenyatta to be present during the second conference on 8 October
30 September 2014	Trial Chamber V(B)	- Refuses request (dated 25 September) to excuse Kenyatta from the status conference on the basis of, *inter alia*, Rule 134*quater* - Partially dissenting opinion of Judge Ozaki
5 December 2014	OTP	Withdraws charges against Kenyatta

Chapter 5

Conclusion: African Presidents *versus* the ICC

The International Criminal Court has faced many challenges since its establishment in 1998. One of the greatest challenges for the Court so far has been the opposition of the African Union against the prosecution and trial of sitting Heads of State. Starting in 2008, when the Prosecutor asked the Pre-Trial Chamber to issue a warrant for the arrest of President Omar al-Bashir of Sudan, the AU has undermined the ICC in various ways. The AU has portrayed the Court as a serious threat to the stability and sovereignty of African states, it has obliged its member states not to cooperate with the ICC in several high-level cases and has even encouraged its member states to withdraw from the Rome Statute.

This opposition of the AU against the ICC stands in contrast to the support that African states initially expressed for Court when they ratified the Rome Statute and referred the first cases to the Prosecutor. The support of African states for the ICC was never univocal and did not come from all parts of Africa. Some states, like Sudan, Rwanda and Libya opposed the Court from the beginning and no less than twenty African states have not ratified the Rome Statute.[1] Yet, for some time these different ideas among African states about the ICC did not withhold the AU from supporting the Court. Most notably, in 2004, the AU Assembly adopted a strategic plan encouraging its member states to join the ICC.[2] The fact that the Assembly decided to do the exact opposite in early 2017, by encouraging its member states to withdraw from the Rome Statute, exemplifies how dramatically the AU's relationship

[1] See for example the statement of Sudan on behalf of the Arab Group in Rome Conference, Official Records, A/CONF.183/13 (Vol.2), 15 June-17 July 1998, p. 126. For a complete overview of the signatures, ratifications and accessions of African states to the Rome Statute, see annex I.

[2] AU Commission, Strategic Plan of the Commission of the AU - Volume 3 (2004-2007 Plan of Action), p. 65.

with the ICC has altered.[3] Whereas the AU once pictured the ICC as a partner or even a friend, it now frames the Court as a threat to its member states.

The reasons for why the AU has turned against the ICC are complex and multi-facetted. There are various interests and ideas behind the AU's decision-making on the ICC. These probably include the fear for prosecution as well as the desire among some African leaders to protect their allies in exchange for political gain. It cannot be ignored, for example, that the Assembly's 2009 decision on the non-cooperation with the arrest of President al-Bashir was pushed for by Muammar Gaddafi, or that the 2013 campaign against the trials of Kenyatta and Ruto was spurred by Yoweri Museveni and Robert Mugabe. The role of these and other notorious African presidents in different stages of the AU's decision-making indicates that the AU's position on the ICC is partly the product of anxious and self-interested leaders.

In some ways, this brings back memories of the AU's predecessor, the Organization of African Unity (OAU). The OAU had a formal policy of 'non-interference' and an infamous record of ignoring gross human rights violations. It should be kept in mind, however, that the objectives of the AU are quite different from the OAU. The organization as a whole has not abandoned the principle of 'non-indifference' towards human rights violations, which remains strongly embedded in its Constitutive Act. Despite the recent opposition against the ICC, the AU continues to stress that the perpetrators of international and other serious crimes should be brought to justice.[4]

What has forged the AU's opposition against the ICC is not, or at least not only, a common desire of African leaders to travel back in time to the OAU and to protect the sovereignty of AU member states in every possible way. One of the things that has united the AU against the ICC is the prosecution

[3] AU Assembly, Decision on the International Criminal Court, Assembly/AU/Dec.622(XXVIII), 30-31 January 2017, para. 8. AU, Draft Withdrawal Strategy Document, 12 January 2017 (on file with the author).

[4] For example, in its first decision on the case against al-Bashir, the AU Assembly '[condemned] the gross violations of human rights in Darfur, and [urged] that the perpetrators be apprehended and brought to justice'. AU Assembly, Decision on the Application by the International Criminal Court Prosecutor the Indictment of the President of the Republic of The Sudan, Assembly/AU/Dec.221(XII), 1-3 February 2009, para. 7.

and trial of sitting Heads of State. When the Security Council referred the situation in Darfur to the Court in 2005, the AU did not immediately run to the defence of Khartoum, even though the Sudanese Government and its closest allies strongly opposed the referral.[5] On the contrary, several African states sponsored the judicial intervention in Darfur, being well aware of the crimes that were being committed there.[6] The AU also spoke out against the ICC's involvement in Sudan, and later in Kenya, when the Court's respective investigations resulted in the prosecution and trial of sitting Heads of State. Among other factors, it were the cases against the incumbent leaders of Sudan and Kenya that inspired the AU to criticize the ICC.

In advance of their own political agenda, some African leaders like President Paul Kagame of Rwanda and Prime Minister Hailemarian Desalegn of Ethiopia have accused the ICC of selectively targeting Africans, and have linked this alleged selectivity to ideas of neo-colonialism and even race-hunting. The Assembly itself has also stressed that international justice needs 'to be conducted in a transparent and fair manner, in order to avoid any perception of double standard'.[7] These and similar accusations of selectivity have proven powerful in their ability to undermine the Court's legitimacy and have dominated much of the debate on the AU's relationship with ICC. Yet, selectivity is not the only or even the main argument that the AU has advanced against the ICC and against the prosecution of African leaders in particular. The one argument that the AU has repeated the most and that appears in almost every decision and statement of the AU on the ICC is that the prosecution and trial of sitting Heads of State poses a threat to the stability and sovereignty of African states.

[5] UNSC, S/PV.5158, 31 March 2005, statements of Sudan, Algeria and Libya. In its first reaction, Sudan called the resolution 'a tool for those who believe that they have a monopoly on virtues in this world'.

[6] Within the Council itself, two African states, Tanzania and Benin, voted in favour of the resolution. UNSC, S/PV.5158, 31 March 2005. The AUPSC also adopted a communique in which it urged the Sudanese Government and the rebel groups to cooperate with the ICC's investigation. AUPSC, Communique, PSC/MIN/Comm.(XLVI), 10 March 2006, para. 5(b)(IX).

[7] AU Assembly, Decision on International Jurisdiction, Justice and the International Criminal Court, Assembly/AU/Dec.482(XXI), 27-28 May 2013, para. 5.

In reaction to the cases against the leaders of Sudan and Kenya the AU has juxtaposed the interests of prosecution and trial against other fundamental political and legal demands. Through its public deliberations, the AU has argued that the prosecution and trial of incumbent leaders undermines the promotion of peace and stability in the region. Furthermore, the AU has claimed that President al-Bashir enjoys immunity from arrest under customary international law and that the Court's proceedings have adversely affected the ability of Kenyatta and Ruto to discharge their official responsibilities as President and Deputy President of Kenya. In advancing these concerns, the AU has placed (1) the importance of prosecution against the interests of peace, (2) the obligation under the Rome Statute to arrest any indicted person against the immunity of sitting Heads of State under customary international law, and (3) the demands of the Court's trial proceedings against the official responsibilities of sitting Heads of State.

This study set out to examine how the Court, the Security Council and the ASP have responded to these expressed concerns about the prosecution and trial of sitting Heads of State. The main research question was two-fold: (1) how did the relevant actors respond to the AU and (2) to what extent are their responses convincing from a legal point of view? In answering the main research question, the previous chapters mapped the responses of the actors that have a legal authority under the Rome Statute to address the AU's concerns (*i.e.*, the Court, the Security Council and the ASP) and assessed whether their actual decisions and statements are based on a convincing interpretation of the Court's legal framework and international law more generally.

As explained in chapter 1, the approach chosen for this study is subject to at least three significant limitations. Firstly, this study is only concerned with one particular aspect of the ICC's Africa problem. Without questioning the importance of other objections that the AU and individual African states have expressed about the ICC, this study focused solely on the AU's concerns about the prosecution and trial of sitting Heads of State. Previous contributions have said a lot about the ICC's alleged selectivity, but this study has left this and other possible aspects of the AU's fragile relationship with the Court unexplored.

Secondly, the scope of this study is confined to the formal responses of one specific group of actors. Only the official decisions and statements of the Court, the Security Council and the ASP were examined, because they are the only actors that have a legal authority under the Rome Statute to act on the AU's concerns. The informal responses of these and other involved actors were not considered. Future research may set out to analyse how individual state leaders, NGOs, academics or employees of the Court have responded to the AU through unofficial channels. Their responses were not considered in this study.

Finally, this study only addressed the legal aspects of the AU's concerns about the prosecution and trial of sitting Heads of State. Existing and future contributions will have much more to say about the forces and interests that shape the AU's decisions, the moral implications of the AU's objections against the ICC, and the impact of these objections on the legitimacy of the ICC. This study only addressed the legal questions that the AU's campaign brought up about the prosecution and trial of sitting Heads of State, which are important as they continue to play a key role in the ongoing debate on the ICC's Africa problem and in the study of international law more generally.

This final chapter highlights the most controversial legal aspects of the ways in which the Court, the Security Council and the ASP have responded to the AU's concerns about the prosecution and trial of sitting Heads of State. In doing so, this chapter emphasizes the bottom-line of this study, which is that the ongoing tensions between the AU and the ICC are not just a matter of power politics or self-interested leaders. There are complex legal issues at play between the AU and the ICC. These issues continue to require attention from commentators, and in some cases demand (immediate) consideration by the Court, the Security Council and the ASP.

I. Prosecution *versus* Peace

A first concern that the AU has voiced about the ICC is that the prosecution and trial of sitting Heads of State jeopardizes the interests of peace and stability. In particular, the AU has warned that the prosecution of President al-Bashir undermined the ongoing efforts to resolve the conflict in Darfur, and

that the trials of Kenyatta and Ruto posed a threat to the stability and peace of Kenya and the wider region. Based on this alleged tension between prosecution and peace, the AU has repeatedly asked the Security Council to defer the prosecution of al-Bashir as well as the cases against Kenyatta and Ruto. To the strong disappointment of the AU, however, the Security Council has refused to grant any of these deferral requests. The Council never agreed on a decision on the proposed deferral for al-Bashir back in 2008 and voted down the deferral bid for Kenyatta and Ruto in 2013.

One reason why the AU failed to gain support from the Council for their deferral requests is that some of the Court's states parties opposed the deferral requests on the basis of a restrictive interpretation of Article 16. These states argued that a deferral request can only be considered by the Council when the continuation of the Court's proceedings poses by itself a threat to the peace in the sense of Article 39 of the UN Charter and even then only when there is absolutely no other way to address this threat.

As explained in chapter 2, I find such calls for a strict interpretation of the Council's deferral power unconvincing in light of text and drafting history of Article 16. This provision does not specify under what kind of conditions the Council should suspend an investigation or prosecution. The Council has a discretionary power to defer an investigation or prosecution, and it is for the Council to decide if and when to invoke this power. This means that the Council's refusal to grant the AU's deferral requests cannot be contested on legal grounds. However, the 'legal' arguments that some states have made against the use of Article 16 should be rejected. Most importantly, it should be stressed that the reference in Article 16 to Chapter VII does not limit the Council's deferral power to the extent that the Council can only issue a deferral when an investigation or prosecution poses by itself a threat to the peace. There is no legal basis for such a limitation to the Council's discretion to determine that a certain situation constitutes a threat to the peace and to decide on the appropriate measures to address this threat.

A second reason for why the AU's deferral requests were refused by the Council is that there is no political consensus on when or how Article 16 should be employed. The members of the Council have expressed very different ideas about the scope and application of this provision, especially when it comes to the kind of circumstances that could justify a deferral. Some states have argued that the Council should never use Article 16 or only when a deferral can support the conclusion of a peace agreement,

whereas others have claimed that the Council should be very flexible and use its deferral power whenever this can help to prevent a negative development of events on the ground. These views on how to use Article 16 are so far apart that they have made any agreement on the AU's deferral requests impossible. In effect, the Council has proven to be in a deadlock when it comes to Article 16.

Because of the limited response of the Council to the AU's deferral requests, several commentators and state actors have argued that there should be an alternative deferral mechanism to address concerns about the negative effects of the Court's proceedings on the interest of peace. First of all, it has been suggested that the Prosecutor could play an active role in balancing the interests of peace and prosecution. The Prosecutor would have this discretion under Article 53 of the Statute, which allows the Prosecutor to suspend the continuation of an investigation or prosecution when this is no longer in the 'interests of justice'. Second of all, the AU has proposed an amendment to Article 16. As introduced by South Africa to the ASP in late 2009, the AU wants to authorize the UN General Assembly to defer the Court's proceedings in case the Council fails to decide on a deferral request within six months of its submission.

Both proposals have been the subject of extensive discussion among commentators, and the views on their legal basis and desirability continue to differ. In my opinion, both proposals are defendable from a legal point of view. As argued in chapter 2, the Prosecutor's discretionary power under Article 53 does not exclude the interests of peace, and the proposed amendment to Article 16 seems compatible with the Statute and the Charter. That said, the reality remains that neither the Prosecutor nor the ASP has proven willing to seriously consider these proposals for an alternative deferral mechanism. The Prosecutor has argued that her Office cannot address the demands of peace and the ASP has side-tracked discussions on the proposed amendment to Article 16. In their view, the Security Council is and should remain the only forum that can addresses matters of peace and security in relation to the ICC.

The consequence of all this is that there might not be a follow-up to peace concerns when the Council is too divided to make a decision, as happened with the AU's deferral request for al-Bashir, or when the Council rejects a deferral bid, as in the case of Kenyatta and Ruto. Some may believe that this

is a good thing, because the Council should not intervene in the Court's proceedings or because the short-term demands of peace should never trump the long-term interests of prosecution. From a legal point of view, however, it is important to stress that the drafters of the Statute recognized that there might be situations in which prosecution does not serve the interests of justice (Article 53) or in which the Council should intervene in the Court's judicial proceedings (Article 16). Cleary, they did not agree on the kind of circumstances that could justify a deferral from either the Council or the Prosecutor, as is illustrated by the open character of Articles 16 and 53. Yet, they did envision that the Court would have a functioning deferral regime, thereby allowing for a certain level of flexibility and pragmatism in addressing the peace concerns of its members.

As things stand, the ICC does not have a functioning deferral regime. The Council's deliberations on the AU's deferral requests have revealed a deep rooted disagreement on the scope and application of Article 16, spurring calls for an alternative deferral mechanism. In turn, the responses of the Prosecutor and the ASP to these calls show a strong reluctance to consider any of the pending proposals. In my view, this is a serious matter that requires further consideration, especially from the Court's states parties. There exists an understandable frustration among African states about the inaccessibility of Article 16. If the relationship between the AU and the ICC is to be improved, then the Court's states parties will need to address this frustration, and develop a common vision on how the Council, the Court and its states parties should act when some of the Court's audiences perceive prosecution as an obstacle to peace.

II. Arrest *versus* Immunity

A second concern that the AU has voiced about the prosecution and trial of African presidents is that sitting Heads of State enjoy immunity from arrest under customary international law. In reaction to the warrant that the Pre-Trial Chamber issued for President al-Bashir in March 2009, the AU Assembly decided that its member states should not cooperate with his arrest. In an attempt to justify this decision under the Rome Statute, the Assembly referred to Article 98(1) of the Statute, which provides that the

Court ‘may not proceed with a request for surrender or assistance’ when this requires a state to violate its international obligations to accord immunity to the official of another state. According to the AU, the Sudanese President would enjoy immunity from arrest under customary international law and Article 98(1) would therefore preclude the Court from obliging its states parties to arrest him.

The claim that sitting Heads of State enjoy immunity from arrest became of particular relevance after 2010, when several African states parties welcomed President al-Bashir for an official state visit. In response to these and later visits, the Court’s judges repeatedly argued that all states parties have an obligation to arrest al-Bashir and that they cannot invoke Article 98(1) to refuse cooperation with the ICC. Yet, the Court’s judges were inconsistent in their argumentation on why al-Bashir does not enjoy immunity from arrest.

In first instance, the Court’s judges tried to avoid giving a formal response to the AU’s position by passing the matter through to the ASP and the Security Council. Only when the ASP and the Council proved reluctant to take any action against states that welcomed al-Bashir, did the PTC decide to take the matter in its own hands. In December 2011, PTC I issued two decisions on the non-cooperation of Chad and Malawi with the ICC. In these decisions, the Chamber ruled that al-Bashir does not enjoy immunity from arrest because of an exception under customary international law for the prosecution of international crimes by an international court like the ICC.

A few years later, in April 2014, the Chamber again ruled that al-Bashir does not enjoy immunity from arrest, but this time on the basis of a completely different line of argumentation. PTC II decided to revise the approach of PTC I in its decision on the non-cooperation of the DRC. The judges of PTC II (including Judge Tarfusser, who had co-authored the decisions of PTC I) argued that Article 98(1) does not apply in the case of al-Bashir, because the Council implicitly waived his immunity when referring the situation in Darfur to the Prosecutor.

Most recently, in July 2017, PTC II revised its approach once more. In the South Africa decision, the Chamber (still including Judge Tarfusser) rejected the argument of the DRC decision that the Security Council implicitly waived al-Bashir’s immunity. Instead, the Court’s judges concluded, by

majority, that Article 98(1) does not apply in the case of al-Bashir because the Security Council's referral placed Sudan in a similar position as a state party.

In light of the current state of the debate on these turns in the Court's jurisprudence, chapter 3 offered a detailed analysis of the Chamber's approaches in the DRC and South Africa decisions. Three conclusions of this analysis should be highlighted here.

First of all, the Chamber's Charter-based approach in the DRC decision is quite different from the Statute-based approach that was employed in the South Africa decision. In the DRC decision, the Chamber suggested that the Court is able to exercise jurisdiction over al-Bashir and to oblige states parties to arrest him because the Council has removed his immunity. The legal basis of the Court's authority to ignore al-Bashir's immunity as sitting Head of State would be the powers of the Council under Chapter VII of the UN Charter. In contrast, the South Africa decision argued (à la Akande) that al-Bashir does not enjoy immunity in relation to the ICC, because Sudan is indirectly bound to the Statute, including Article 27(2).

Second of all, the two variants of the Security Council avenue, as employed by the Chamber, are both based on an unconvincing interpretation of the Rome Statute, the Resolution of the Council and/or international law. With respect to the Charter-based approach of the DRC decision, the Court failed to resolve questions about the powers of the Council, the interpretation of Resolution 1593 and about the ability of the Court to act on the basis of the Council's powers under Chapter VII. In my view, the Court has failed to explain on what basis the Council can remove immunities in an implicit manner and, if the Court would have this power, why the Resolution should be interpreted to encompass an implicit removal. In contrast to the DRC decision, I believe that Resolution 1593 'only' created an obligation for Sudan to waive the immunities of its officials when this is requested by the Court. This interpretation fits best with the ordinary meaning of Sudan's obligation to 'cooperate fully' and acknowledges the fact that the Council did not (have to) discuss the issue of the immunities of Sudan's officials at the time when the Resolution was adopted.

Furthermore, it should be noted that even if all UN member states would have an obligation to consider al-Bashir's immunities as having been waived, then the Court is not in a position to hold this obligation against its states parties. For as long as Sudan has not acted on its obligation to waive al-Bashir's immunity, states parties would still act inconsistently with their obligation under international law to respect this immunity when they would decide to arrest the Sudanese President. Article 98(1) would continue to apply, because the Court cannot absorb the powers of the Council under the Chapter VII and Article 103 of the Charter.

With regard to the alternative Statute-based approach that was employed in the South Africa decision, I have underscored that this approach prompts unanswered questions as well, especially about how the Court should act upon a Security Council referral. In addressing these questions, I have taken a different position than PTC II by arguing that the Court should treat Sudan, as a matter of principle, as a non-party. There is not a textual argument, neither in the Resolution (which accepts the distinction between states parties and non-parties) nor in the Statute, for treating Sudan as a state party. In my opinion, Article 98(1) continues to apply in the case of al-Bashir, for as long as his immunity has not been explicitly waived, removed or otherwise made inapplicable.

Finally, the third conclusion that should be recalled is that there remains a significant degree of ambiguity and uncertainty about the obligation of states parties to arrest al-Bashir. There is no denial that the Chamber has been very clear that all states parties have an obligation to arrest the Sudanese President. However, the Chamber's decisions have been contradictory and have been far from univocal about why states parties cannot rely on Article 98(1). Put to the test, the Court's current position on the immunity of al-Bashir is simply not convincing enough, in the sense that the Court's judges have not taken away the ambiguity and uncertainty that is inherent in Article 98(1) and the ICC's immunity regime as a whole. This matter requires further consideration from the Court as well as its states parties.

As things stand, there a number of ways in which the Court and its states parties can seek to clarify the ICC's immunity regime in general and the matter of al-Bashir's immunity in particular. Most importantly, affected states could pursue a judgment from the ICC's Appeals Chamber, or try to seek an advisory opinion from the International Court of Justice. Both the Appeals Chamber and the ICJ

could help to take away (some of) the ambiguity and uncertainty surrounding the obligation of states parties to arrest al-Bashir. Moreover, the ICC's immunity regime could benefit from more specific rules on Article 97 and 98 of the Statute, and possibly an amendment of these provisions in the future.

Ultimately, the AU's claim that President al-Bashir enjoys immunity from arrest has exposed a fundamental tension in the ICC's immunity regime and in international law more generally. This is the tension between 'old' rules of international law that require states to recognize the immunities of foreign state officials and 'new' rules and principles that demand the prosecution of these officials when they commit international crimes. In response to the AU, the Court's judges have tried to circumvent this tension in different ways. Yet, each of these ways has proven to be controversial. For now, the ICC's immunity regime and the matter of al-Bashir's immunity remain 'unresolved', in the sense that they are both surrounded by ambiguity and uncertainty.

III. Trial *versus* Official Responsibilities

A third concern that the AU has advanced against the ICC is that the Court's trial proceedings have a negative effect on the official responsibilities of African presidents. After 'UhuRuto' won the Kenyan presidential elections in 2013, the AU and the newly installed Kenyan government took several steps aimed at delaying their cases before the ICC. Apart from a deferral request to the Security Council, the AU supported a special application from the Defence Teams of Kenyatta and Ruto. This application asked the Court to excuse them from continuous presence during their trials. According to the AU, the Head and Deputy Head of State of Kenya should be able to choose which sessions of their trials they would attend.

From a legal point of view, the excusal requests of the AU raised difficult questions about the discretion of the Trial Chamber to waive the requirement of the accused to be present at trial. In addressing these questions, the two Trial Chambers initially showed flexibility by excusing Kenyatta and Ruto from almost all trial hearings. According to Judge Eboe-Osuji and Judge Fremr, who sat in both Chambers, an exemption to the presence requirement under Article 63(1) would be reasonable in

this case given the official responsibilities of Kenyatta and Ruto as President and Deputy President of Kenya.

However, the Trial Chamber's initial excusals had to be vacated, after the Appeals Chamber ruled that the Trial Chamber had granted Ruto an excusal which effectively made his absence the general rule and his presence an exception. The Appeals Chamber concluded, by majority, that the Trial Chamber is only allowed to excuse an accused from continuous presence at trial in exceptional circumstances and only when a number of additional conditions are fulfilled. In this way, the Appeals Chamber foreshadowed that Kenyatta and Ruto would have to attend a significant part of their trials.

In a follow-up to the Appeal Chamber's decision, as well as the refusal of the Security Council to issue a deferral, the AU pressured the ASP to amend the provisions in the Statute on immunity and presence at trial. These amendments would have to ensure that sitting Heads of State could be exempted from prosecution and could be excused from having to attend their trials in person. During an eventful meeting of the ASP in late 2013, many of the Court's states parties acknowledged the concerns of the AU, but opposed the proposed amendments to the Statute. As a compromise, the ASP agreed with the AU to revise the Rules on presence at trial. Most importantly, the ASP agreed to adopt Rule 134*quater*, so that the Trial Chamber could excuse a sitting Head of State under more flexible conditions than the Appeals Chamber had formulated. A few weeks later, the Trial Chamber excused Ruto from most parts of his trial on the basis of this new Rule.

With the adoption and application of Rule 134*quater*, the Court and the ASP established an excusal regime based on ideas of flexibility and pragmatism. From now on, the Court's trials could continue, with or without the presence of the accused, and sitting Heads of State Heads could combine their trials in The Hague with their official responsibilities back home. While some may find this a reasonable compromise, there are at least four problems with these new rules on presence at trial.

First of all, Rule 134*quater* cannot be reconciled with the text of Article 63(1), which states that the accused 'shall be present during the trial'. What is left of this duty, if the accused may skip almost all trial hearings? The Appeals Chamber issued an authoritative decision on Article 63(1) in which it

concluded that the Trial Chamber has a certain discretion to excuse an accused in exceptional circumstances, but that continuous presence should remain the rule. Rule 134*quater* ignores this important condition, and thereby violates Article 51(4) of the Statute, which dictates that the Rules and amendments thereto 'shall be consistent' with the Statute.

Second of all, the excusal that the Trial Chamber granted to Ruto on the basis of Rule 134*quater* infringes upon the equal treatment principle that is embedded in Article 27(1). In a general sense, Rule 134*quater* does not necessarily imply a distinction on the basis of official capacity. However, the way in which the Trial Chamber interpreted and applied Rule 134*quater* does imply a distinction on the basis of official capacity and is thus manifestly inconsistent with Article 27(1). Instead of focussing on the extraordinary duties that Ruto personally has to fulfil, the Chamber based his excusal on the day-to-day functions of the Deputy President of Kenya under the Kenyan Constitution. In this way, the Trial Chamber created a precedent for treating sitting (Deputy) Heads of State in a different manner than another accused.

Third of all, another problem with the application of the new rules on presence at trial is that by allowing the accused to be absent from large parts of the trial, these rules risks to undermine the administration of justice. The Appeals Chamber emphasized in its judgment on presence at trial that the accused is not a passive observer of the trial, but an active participant therein. The active involvement of the accused in his or her trial is crucial not only to protect the rights of the accused, but also because it is through the process of confronting the accused with the evidence, that the Court can form a complete record of the relevant events. In my opinion, the absence of an accused during most witness testimonies can easily undermine the recording of the events in which the accused may or may not have been involved.

Finally, a last problem with the new rules on presence at trial is that they have established a precedent for overturning decisions of the Appeals Chamber by way of an amendment to the RPE. The ASP has the power to consider the political implications of the way in which the Court interprets and applies its legal framework and may adjust this framework accordingly. There are, however, important reasons for why the ASP cannot amend the Statute overnight and why the RPE are subordinate to the

Statute. The underlying logic is that political convenience should not determine the daily functioning of an international court. This means that general rules should not be revised only to fit the circumstances of a specific case, something which did happen with Rule 134*quater*.

In sum, with the adoption and application of Rule 134*quater* the Court and its states parties developed a special excusal regime for accused who fulfil official responsibilities, like a sitting Head of State. Of course, a certain level of flexibility and pragmatism may be needed when the accused has to fulfil important public duties, especially in a situation that cannot be anticipated like a terrorist attack or a natural disaster. However, with Rule 134*quater*, the ICC's excusal regime has gone far beyond short term absences for unpredictable situations. In response to the AU, the ASP and the Court have effectively conflated the official responsibilities of a sitting Head of State with the important public duties that an accused may have to fulfil in the context of unforeseen developments. In this way, the Court and its states parties have created a precedent for treating sitting Heads of State and other senior state officials differently before the Court than other accused, not because of their demanding responsibilities, but simply because of their official status.

IV. Final Remarks

Looking back at the past decade, the opposition of the AU against the ICC stands out as one of the greatest challenges for the Court so far. The AU has criticized the ICC in powerful terms. It has obliged its member states not to cooperate with the Court in several high-level cases and has recently adopted a collective withdrawal strategy encouraging its member states to leave the Court. Individual African leaders have spiced this opposition with accusations of prosecutorial selectivity and have claimed that the ICC targets Africans. Yet, prosecutorial selectivity is not the only and perhaps not even the main reason for the AU to criticize the Court. The AU's opposition against the ICC has also been directed against the prosecution and trial of sitting Heads of State.

In criticizing the cases against al-Bashir, Kenyatta and Ruto, the AU has portrayed the ICC as a serious threat to its member states. The AU Peace and Security Council and its Assembly of Heads of

State and Government have argued that the ICC has jeopardized the promotion of peace. In addition, the AU has stressed that al-Bashir enjoys immunity from arrest under customary international law and that the trials of Kenyatta and Ruto have undermined their ability to fulfil their constitutional duties as leaders of Kenya. In advancing these concerns, the AU has placed (1) the importance of prosecution against the interests of peace, (2) the obligation to arrest against the immunity of sitting Heads of State, and (3) the Court's trial proceedings against the official responsibilities of sitting Heads of State.

In a previous publication, entitled *Africa and the ICC: Perceptions of Justice*, I examined the political power of these three juxtapositions.[8] Together with Kamari Clarke and Eefje de Volder, I explored how the AU and other relevant actors have shaped perceptions of the Court among its different audiences in Africa and concluded that the AU's campaign against the prosecution of African presidents is powerful, in the sense that it puts the Court's legitimacy under pressure.[9] The AU's message that the ICC poses a threat to the sovereignty and stability of African states stimulates local communities and other relevant audiences to oppose the ICC and helps self-interested leaders to justify their decisions not to support the Court.

In this study, I have not been concerned with the societal, political or moral implications of the AU's opposition against the ICC. Without denying the importance of these implications, I have focussed on the legal questions that the AU's campaign has brought up about complex legal issues like the immunity of sitting Heads of State, the equal treatment principle and the deferral power of the Security Council. More specifically, I have analysed (a) how the Court, the Security Council and the ASP have addressed these issues and (b) whether they have done so on the basis of a convincing interpretation of the Court's legal framework and international law more generally.

[8] Abel S. Knottnerus, 'The AU, the ICC and the Prosecution of African Presidents', in Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (eds.), *Africa and the ICC: Perceptions of Justice* (New York: Cambridge University Press, 2016), pp. 152-184.

[9] Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (eds.), *Africa and the ICC: Perceptions of Justice* (New York: Cambridge University Press, 2016), pp. 6-7, 440.

It should be clear by now that, in my opinion, the Court, the Security Council and the ASP have not always responded to the AU's concerns in a legally convincing manner:

(1) As things stand, *the ICC's deferral regime is dysfunctional*. This is problematic from a legal point of view, because Articles 16 and 53 clearly envision a working deferral regime, providing a certain level of flexibility and pragmatism for the Security Council and the Prosecutor to address the peace concerns of states parties.

(2) *The ICC's immunity regime in general and the matter of al-Bashir's immunity in particular remain unresolved*. The AU's claim that al-Bashir enjoys immunity from arrest has exposed the ambiguity and uncertainty that is inherent in the ICC's immunity regime. In its inconsistent decisions on the immunity of al-Bashir, the Court has not settled this matter in a convincing manner.

(3) *The Court and its states parties have established a special excusal regime*, based on the legally dubious idea that sitting Heads of State should be treated differently than other accused, because of their official status. With the adoption and application of new rules on presence at trial, the Court and its states parties have violated several provisions of the Rome Statute, including the equal treatment principle that is embedded in Article 27(1).

All in all, the Court, the Security Council and the ASP have not managed to resolve the three juxtapositions that the AU has advanced against the prosecution and trial of sitting Heads of State in a legally convincing manner. What is more, with the exception of the new rules on presence at trial, which helped to diminish the perceived tension between trial and official responsibilities, the Court and its states parties have failed to move beyond the strong concerns that the AU has expressed about the ICC.

Since 2008, the AU has proposed various solutions to address its remaining concerns, including amendments to several provisions of the Rome Statute.[10] Most notably, the AU has tabled a proposal to amend Article 16 and has introduced a more drastic proposal to constrain the Court's power to prosecute

[10] For a list of all proposed amendments, see annex II.

sitting Heads of State. Since 2013, when the threat of an African mass withdrawal became more realistic, the Court and its states parties have been willing to discuss the AU's concerns in informal meetings.[11] Yet, at the same time, they have proven reluctant to seriously consider most of the AU's suggestions. According to the AU itself, the refusal of the Court and its states parties to take its proposals seriously is one of the main reasons for its decision to adopt a strategy on the collective withdrawal of African states from the Rome Statute in early 2017.[12] Ultimately, this strategy should be understood as the latest and most nuclear step in a series of threats to push the ASP and the Security Council to agree to the AU's far-reaching demands on the prosecution and trial of sitting Heads of State.

Over the past few years, the ICC and its states parties have made several efforts to keep the AU and its member states on board. The Court's states parties have, for example, appointed an African as Prosecutor (Fatou Bensouda from the Gambia), elected an African as President of the ASP (Sidiki Kaba from Senegal),[13] and have organized various seminars, retreats and diplomatic visits aimed at improving the Court's relationship with Africa.[14] Moreover, the ASP has agreed to a special excusal regime to

[11] Note that there is also a pending proposal for an ICC liaison office at the AU's Headquarters in Addis Ababa. ASP, Resolution ICC-ASP/15/Res.5, 16 November 2016, para. 41 ('emphasizes the need to pursue efforts aimed at intensifying dialogue with the African Union and to strengthen the relationship between the Court and the African Union and commits to the Court's further regular engagement in Addis Ababa with the African Union and diplomatic missions in anticipation of establishing its liaison office, recognizes the engagement of the President of the Assembly with officials of the African Union in Addis Ababa and calls upon all relevant stakeholders to support strengthening the relationship between the Court and the African Union').

[12] AU, Draft Withdrawal Strategy Document, 12 January 2017 (on file with the author), paras. 3, 7, 9, 29 and 30.

[13] ASP, Press Release - Minister of Justice of Senegal, H.E. Mr. Sidiki Kaba, endorsed for the position of President of the Assembly, visit The Hague, ICC-ASP-20141120-PR1066, 20 November 2014.

[14] See for example ICC, Press Release - International Criminal Court holds retreat with African States Parties in Addis Ababa, ICC-CPI-20161207-PR 1263, 7 December 2016; ICC, Press Release, High-level ICC Regional Seminar concludes in Botswana, ICC-CPI-20151030-PR1164, 30 October 2015; ASP, Press Release - The President of the Assembly of States Parties meets with the Chairperson of the African Union Commission and with the Bureau of the Committee of Representatives, ICC-ASP-20150814-PR1138, 14 August 2015; ASP, Press Release - To commemorate the Day of International Criminal Justice, the President of the Assembly convenes a regional discussion in Dakar on state sovereignty and international criminal

address the AU's concerns about the trials of Kenyatta and Ruto, and has promised South Africa to address its concerns about Article 97 by establishing a working group on the implementation of this provision. These and other initiatives are important 'signs of good will' and have at certain points prevented further immediate escalation. Yet, none of these appointments, special rules or working groups has really helped to resolve the underlying concerns of the AU about the ICC.

As things stand, the AU and most of its member states will not likely change their position on the prosecution and trial of sitting Heads of State, especially for as long as the case against al-Bashir remains ongoing. The recent announcement of a number of African states that they will not endorse the AU's collective withdrawal strategy as well as the decisions of South Africa and the Gambia to rescind their initial withdrawal from the Rome Statute indicate that the threat of a mass-withdrawal may be averted for now. Yet, even if all African states parties remain members of the ICC, the AU's campaign against the prosecution of African presidents will probably continue. This will put further pressure on the Court and as such on its ability to obtain the necessary support for its investigations and prosecutions in and outside Africa.

This study has mapped and evaluated how the Court, the Security Council and the ASP have responded to the AU's opposition against the prosecution and trial of sitting Heads of State. Future studies will have to continue to observe these responses and will have to explore more of the various legal, political, societal and moral implications of the AU's disengagements with the ICC. Perhaps, the AU will eventually fall back in-line or maybe its opposition is just the beginning of the end for the Court's ability to play a meaningful role in Africa. Whatever happens, international law and international criminal law in particular have already paid a substantial price. The non-cooperation and rhetorical opposition of the AU has been one thing, the legally questionable responses from the Court and its states parties have been another.

justice, ICC-ASP-20150722-PR1134, 22 July 2015; ASP, Press Release - Seminar on cooperation with the ICC concludes in Benin, ICC-CPI-20141105-PR1060, 5 November 2014.

In my opinion, the Court, the Security Council and the ASP have failed to respond to the AU's concerns in a legally convincing manner. This is not to say that the Court and its supporters should have given in to the AU or that the AU is somehow right in its opposition against the prosecution of al-Bashir and the trials of Kenyatta and Ruto. The bottom-line of this study is that while many observers tend to portray the ongoing tensions between the AU and the ICC as a matter of power politics and self-interested leaders, the situation is actually way more complex than that. The AU is not just legally wrong and the ICC legally right, or the other way around. There are intricate legal issues at play between the AU and the ICC, that touch on fundamental and unresolved aspects of the current international legal order, such as the inherent tension between the protection of state sovereignty and the advancement of human rights. These issues continue to require attention from commentators and some of the addressed issues like the immunity of al-Bashir and the ICC's deferral regime also demand (immediate) consideration by the Court, the Security Council and the ASP. This is necessary to bring the AU and the ICC closer together, to respect the Court's legal framework and ultimately to continue the development of international law in good faith.

Annex I

African States and the Rome Statute[1]

State [2]	*Signature*	*Ratification or Accession(a)*
Algeria	28 Dec 2000	
Angola	7 Oct 1998	
Benin	24 Sep 1999	22 Jan 2002
Botswana	8 Sep 2000	8 Sep 2000
Burkina Faso	30 Nov 1998	16 Apr 2004
Burundi [3]	13 Jan 1999	21 Sep 2004
Cabo Verde	28 Dec 2000	10 Oct 2011
Cameroon	17 July 1998	
CAR	7 Dec 1999	3 Oct 2001
Chad	20 Oct 1999	1 Nov 2006
Comoros	22 Sep 2000	18 Aug 2006
Congo	17 Jul 1998	3 May 2004
Côte d'Ivoire (Ivory Coast)	30 Nov 1998	15 Feb 2013
DRC	8 Sep 2000	11 Apr 2002
Djibouti	7 Oct 1998	5 Nov 2002
Egypt [4]	26 Dec 2000	
Equatorial Guinea	X	
Eritrea	7 Oct 1998	
Ethiopia	X	
Gabon	22 Dec 1998	20 Sep 2000
Gambia [5]	4 Dec 1998	28 Jun 2002
Ghana	18 Jul 1998	20 Dec 1999
Guinea	7 Sep 2000	14 Jul 2003
Guinea-Bissau	12 Sept 2000	
Kenya	11 Aug 1999	15 Mar 2005

[1] Based on United Nations Treaty Collection (as of 31 July 2017).

[2] This list includes the 54 African UN Member states.

[3] Burundi has decided to withdraw from the Rome Statute. This decision will take effect on 27 October 2017. UN Treaties Collection (C.N.805.2016.TREATIES-XVIII.10), Depository notification withdrawal by the Republic of Burundi, 27 October 2016

[4] Note that Egypt issued a declaration upon its signature.

[5] On 10 November 2016, Gambia notified the Secretary General of its decision to withdraw from the Rome Statute. In February 2017, however, Gambia notified the Secretary General of its decision to rescind that notification of withdrawal with immediate effect. UN Treaties Collection (C.N.862.2016.TREATIES-XVIII.10), Depository notification by the Islamic Republic of the Gambia, 10 November 2016; UN Treaties Collection (C.N.62.2017.TREATIES-XVIII.10), Depository notification by the Islamic Republic of Gambia, 10 February 2017.

Lesotho	30 Nov 1998	6 Sep 2000
Liberia	17 Jul 1998	22 Sep 2004
Libya	X	
Madagascar	18 Jul 1998	14 Mar 2008
Malawi	2 Mar 1999	19 Sep 2002
Mali	17 Jul 1998	16 Aug 2000
Mauritania	X	
Mauritius	11 Nov 1998	5 Mar 2002
Morocco	8 Sep 2000	
Mozambique	28 Dec 2000	
Namibia	27 Oct 1998	25 Jun 2002
Niger	17 Jul 1998	11 Apr 2002
Nigeria	1 Jun 2000	27 Sep 2001
Rwanda	X	
São Tomé and Principe	28 Dec 2000	
Senegal	18 Jul 1998	2 Feb 1999
Seychelles	28 Dec 2000	10 Aug 2010
Sierra Leone	17 Oct 1998	15 Sep 2000
Somalia	X	
South Africa [6]	17 Jul 1998	27 Nov 2000
South Sudan	X	
Sudan [7]	8 Sep 2000	
Swaziland	X	
Togo	X	
Tunisia		24 Jun 2011 (a)
Uganda	17 Mar 1999	14 Jun 2002
United Republic of Tanzania	29 Dec 2000	20 Aug 2002
Zambia	17 July 1998	13 Nov 2002
Zimbabwe	17 Jul 1998	

[6] On 19 October 2016, South Africa notified the Secretary General of its decision to withdraw from the Rome Statute. In March 2017, however, South Africa notified the Secretary General of its decision to rescind that notification of withdrawal with immediate effect. This notification followed upon a ruling of the High Court of South Africa, which declared the initial withdrawal decision unconstitutional. See UN Treaties Collection (C.N.786.2016.TREATIES-XVIII.10), Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court, 19 October 2016; Democratic Alliance v Minister of International Relations and Cooperation, Judgment Gauteng Division of the High Court, 22 February 2017; UN Treaties Collection (C.N.121.2017.TREATIES-XVIII.10), Depository notification by the Republic of South Africa, 7 March 2017. UN Treaties Collection (C.N.786.2016.TREATIES-XVIII.10).

[7] Note that in a communication received on 26 August 2008, Sudan informed the Secretary-General that it did 'not intend to become a party to the Rome Statute' and that 'Sudan has no legal obligation arising from its signature'.

Annex II

Proposed Amendments by the African Union to the Rome Statute[1]

Since 2009, several amendments have been submitted to the Working on Amendments of the ASP by African states parties to the ICC. Some of these proposed amendments were submitted on behalf of the AU based on decisions of the AU Assembly and others by individual African states parties. As explained in the 2017 withdrawal strategy, all these proposed amendments are supported by the African Union. The overview that is included in this annex was given in the withdrawal strategy document and provides:

(1) The name of the state that submitted the amendment;

(2) The text of the proposed amendment (in **bold)**;

(3) The AU's own explanation of the amendment;

(4) The AU's understanding of the status of the proposed amendment.

For the purposes of this study, the most relevant proposed amendments are the ones on (A) the Security Council's deferral power, (C) on presence at trial and (D) on the immunity of sitting Heads of State. They are discussed in more detail in chapters 2, 3 and 4. The other three proposed amendments concern (B) the recognition of regional justice mechanism in the ICC's complementarity regime, (E) the commission of offences against the administration of justice by Court officials and (F) the Independent Oversight Mechanism. These amendments are not further considered in this study.

[1] As included in AU, Draft Withdrawal Strategy Document, 12 January 2017 (on file with the author).

	(1) Member State	(2) Proposed amendments	(3) AU's Explanation	(4) Status
A	South Africa[2]	Article 16 1) No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect, that request may be renewed by the Council under the same conditions. 2) A State with jurisdiction over a situation before the Court may request the UNSC to defer the matter before the Court as provided for in (1) above. 3) Where the UN Security Council fails to decide on the request by the State concerned within six (6) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council's responsibility under paragraph 1 consistent with Resolution 377 (v) of the UN General Assembly.	African states parties to the Rome Statute held a meeting from 3-6 November 2009 in Addis Abba chaired by South Africa, at which it was decided to propose an amendment to the Rome Statute in respect of Article 16 of the Statute. The reason for the proposal is to address a situation where the UNSC is unable to decide on a deferral request, such be transferred to the UNGA for a decisions. This was evidenced in the refusal of the UNSC to address or respond to the deferral request of the AU in relation to the case against the President of the Sudan.	Pending
B.	Kenya[3]	Preamble - Complementarity "Emphasizing that the International Criminal Court established under this Statute shall be complementary to national and regional criminal jurisdictions.	The Preamble of the Rome Statute provides "Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,'' In accordance with African Union resolutions, the amendment is proposed to allow recognition of regional judicial mechanisms.	Pending

[2] UN Treaties Collection (C.N.851.2009.TREATIES-10), South Africa: Proposal of Amendment, 18 November 2009.

[3] UN Treaties Collection (C.N.1026.2013.TREATIES-XVIII.10), Kenya: Proposal of Amendments, 14 March 2014.

C.	Kenya	Article 63 - Trial in the Presence of the accused "Notwithstanding article 63(1), an accused may be excused from continuous presence in the Court after the Chamber satisfies itself that exceptional circumstances exists, alternative measures have been put in place and considered, including but not limited to changes to the trial schedule or temporary adjournment or attendance through the use of communications technology or through representation of Counsel. (2) Any such absence shall be considered on a case-by-case basis and be limited to that which is strictly necessary. (3) The Trial Chamber shall only grant the request if it determines that such exceptional circumstances exist and if the rights of the accused are fully ensured in his or her absence, in particular through representation by counsel and that the accused has explicitly waived his right to be present a trial.	Under the Rome Statute, article 63(2) envisages a trial in absence of the accused in exceptional circumstances. The Rome Statute does not define the term exceptional circumstances and neither are there case laws to guide the Court on the same. Article 63(2) further provides other caveats in granting such trials in circumstances where other reasonable alternatives have provided to be inadequate and for a strictly required duration.	Pending
D.	Kenya	Article 27 - Irrelevance of official capacity "[…] Heads of State, their deputies and anybody acting or is entitled to act as such may be exempt from prosecution during their current term of office. Such an exemption may be renewed by the Court under the same conditions."	While being a Head of State or Government such will not exempt them from criminal liability for international crimes allegedly perpetuated, prosecution should not be instituted until the Head of State or Government or anyone entitled to act as such, has left office - in accordance with domestic and customary international law.	Pending
E.	Kenya	Article 70 - Offences against Administration of Justice "The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally by any person:"	This particular article presumes that such offences save for 70(1)(f) can be committed only against the Court. This article should be amended to include offences by the Court Officials so that it's clear that either party to the proceedings can approach the Court when such offences are committed.	

F.	Kenya	Article 112 - Implementation of IOM The Independent Oversight Mechanism (IOM) be operationalized and empowered to carry out inspection, evaluation and investigations of all the organs of the Court.	Article 112(4) - The Assembly of States Parties shall establish such subsidiary bodies as may be necessary including Independent Oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy. This includes the conduct of officers/procedure/code of ethics in the Office of the Prosecutor. The OTP has historically opposed the scope of authority of the IOM. Under Article 42(1) and (2) the Prosecutor has power to act independently as a separate organ of the Court with full authority over the management and administration of the office. There is a conflict of powers between the OTP and the IOM that is continuously present in the ASP.	

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Summary

The International Criminal Court (ICC) in The Hague has faced many challenges since its establishment in 1998. One of the greatest challenges so far has been the opposition of the African Union (AU) against the ICC. Since 2008, when the Prosecutor asked the Pre-Trial Chamber to issue a warrant for the arrest of President Omar al-Bashir of Sudan, the AU has undermined the ICC in various ways. The AU has obliged its member states not to cooperate with the Court in high-level cases and has even adopted a collective withdrawal strategy encouraging African states to leave the Court.

One of the most important reasons for the AU to oppose the ICC is that many African states have strong concerns about the prosecution and trial of sitting Heads of State and Government. The prosecution of al-Bashir and the trials of Kenyan President Uhuru Kenyatta and his Deputy William Ruto have led the AU to portray the Court as a serious threat to the stability and sovereignty of African states. More specifically, the AU has claimed (1) that the ICC jeopardizes the promotion of peace (2) that sitting Heads of State like al-Bashir enjoy immunity from arrest under international law and (3) that the trials of sitting Heads of State like Kenyatta undermine their ability to fulfil their official responsibilities.

The dissertation 'African Presidents and the International Criminal Court' provides a detailed legal analysis of the AU's concerns about the prosecution and trial of siting Heads of State. It concentrates on the decisions that have been adopted by the Court, the UN Security Council and the Assembly of States Parties (ASP) in reaction the AU. How have they responded to the AU's concerns and to what extent are their decisions based on a convincing interpretation of the Court's legal framework and international law more generally?

In studying the responses to the AU, the dissertation adopts a legal approach. It does not chart the forces and interests that shape the AU's decision-making, nor does it seek to review the moral implications of the AU's objections against the ICC. Instead, the dissertation focusses only on the legal questions that the AU's concerns have brought up about controversial legal issues like the immunity of

sitting Heads of State and the power of the Security Council to defer the Court's proceedings. These questions are examined in view of the Court's legal framework and the applicable rules of interpretation.

Chapter 1 introduces the legal approach of this dissertation. It explains the relative weight of the different sources of law that together form the Court's legal framework and analyses the applicable rules of interpretation, and especially the rules of the Vienna Convention on the Law of Treaties. These and related rules make some interpretations, and in most cases one particular interpretation more convincing than others. The following chapters apply these rules to assess the different responses to the AU's concerns.

Chapter 2 addresses the AU's objection that the prosecution and trial of sitting Heads of State jeopardizes the interests of peace and security in African states. In light of this, the AU has repeatedly asked the Security Council to defer the prosecution of al-Bashir and the trials of Kenyatta and Ruto. To its strong disappointment, however, the Council never took a decision on the proposed deferral for al-Bashir and voted down the deferral bid for Kenyatta and Ruto.

The first part of chapter 2 examines the legal scope of the Council's deferral power and analyses its decision-making on the AU's deferral requests. An important point is that the text of Article 16 of the ICC Statute does not specify under what kind of conditions the Council should suspend an investigation or prosecution. The provision gives the Council a discretionary power to defer without explaining when the Council should use this power. In the debate on the AU's deferral requests, some states argued that the Council can only issue a deferral when an investigation or prosecution poses a direct threat to the peace (in the meaning of Article 39 of the UN Charter). Yet, this position finds no support in the text or in the drafting history of Article 16.

The use of these type of unconvincing legal arguments does illustrate the lack of consensus in the Council on when or how Article 16 should be employed. The members of the Council have expressed very different ideas about the kind of circumstances that could justify a deferral. In response to the AU's deferral requests, some states have argued that the Council should never use Article 16, whereas others states have claimed that the Council should be flexible in exercising its deferral power. These and other

views on the application of Article 16 are so far apart that they have made any agreement on the AU's deferral requests impossible. In effect, the Council has proven to be in a deadlock on how to use Article 16.

The second part of the chapter 2 considers the responses of the ICC Prosecutor and the ASP to the AU's peace concerns. Several commentators have suggested that the Prosecutor could cease a prosecution when the Court's continued involvement obstructs the interests of peace and security. In addition, the AU has argued that the ASP should amend Article 16 and empower the UN General Assembly to defer an investigation or prosecution when the Council fails to act upon a deferral request within six months of its receipt. Both proposals for an alternative deferral mechanism seem compatible with the Statute and the UN Charter. However, the Prosecutor and the ASP have proven unwilling to seriously consider these proposals. The Prosecutor has argued that she cannot address the demands of peace and the ASP has side-tracked discussions on the proposed amendment to Article 16. Both the Prosecutor and the ASP believe that only the Council should be able to address the interest of peace in relation to the ICC.

As things stand, there is no alternative deferral mechanism. There is no follow-up to peace concerns when the Council is too divided to make a decision, as happened with the AU's deferral request for al-Bashir, or when the Council rejects a deferral bid, as in the case of Kenyatta and Ruto. Some believe that this is for the better, because the Council should not intervene in the Court's proceedings or because the short-term demands of peace should never trump the long-term interests of prosecution. From a legal point of view, however, it is important to stress that the drafters of the Statute recognized that there might be situations in which prosecution does not serve the interests of justice (Article 53) or in which the Council should intervene in the Court's judicial proceedings (Article 16). Clearly, they did not agree on the kind of circumstances that could justify a deferral, from either the Council or the Prosecutor. Yet, they did envision that the Court would have a functioning deferral regime, thereby allowing for a certain degree of flexibility and pragmatism in addressing the peace concerns of states.

Chapter 3 focuses on the AU's claim that President al-Bashir continues to enjoy immunity from arrest. In reaction to al-Bashir's prosecution, the AU obliged its member states not to cooperate with his

arrest. In an attempt to justify this decision under the Statute, the AU referred to Article 98(1), which provides that the Court 'may not proceed with a request for surrender or assistance' when this requires a state to violate its international obligation to accord immunity to the officials of another state. A different provision of the Statute, Article 27(2), stipulates that immunities 'shall not bar the Court from exercising its jurisdiction'. According to the AU, however, Article 27(2) does not apply to al-Bashir, because Sudan never ratified the Rome Statute (the situation in Darfur was referred by the Security Council in Resolution 1593). As sitting Head of State, al-Bashir would still enjoy immunity from arrest under customary international law and Article 98(1) would preclude the Court from obliging its states parties to arrest him.

This claim of the AU became of particular relevance after 2010, when several African states parties welcomed al-Bashir for an official state visit. In response to these visits, the Court's judges ruled that all states parties have an obligation to arrest al-Bashir and cannot invoke Article 98(1). Remarkably, however, the Court's judges adopted different approaches on the question why al-Bashir would not enjoy immunity from arrest. In decisions on the non-cooperation of Chad and Malawi in 2011, the Chamber ruled that there exists an exception under customary international law for the prosecution of international crimes by an international court. No sitting Head of State could ever claim immunity before the ICC. A few years later, however, the Chamber argued in the decision on the non-cooperation of the DRC that Article 98(1) does not apply in the case of al-Bashir, because the Security Council implicitly waived his immunity through its powers under the UN Charter. Most recently, in July 2017, the Court revised its position once more. In its decision on the non-cooperation of South Africa, the Chamber concluded that Article 98(1) does not apply because Sudan is (indirectly) bound to the Statute, including Article 27(2).

After explaining the different approaches of the Court's judges, the chapter analyses whether these approaches are based on a convincing interpretation of the Statute and international law more generally. With respect to the Charter-based approach of the DRC decision, it concludes that the Court failed to resolve important questions about the powers of the Council, the interpretation of Resolution 1593 and the ability of the Court to act on the basis of the Council's powers under Chapter VII. Most

importantly, the Court failed to explain on what basis the Council can remove immunities in an implicit manner and why the Resolution should be interpreted to encompass an implicit removal. Moreover, the Court failed to acknowledge that even if all UN member states have an obligation to consider al-Bashir's immunities as having being waived, the Court cannot hold this obligation against its states parties, because it cannot absorb the powers of the Council.

With regard to the alternative Statute-based approach that was adopted in the South Africa decision, the chapter underscores that this approach also prompts unanswered questions, especially about how the Court should act upon a Security Council referral. In addressing these questions, it concludes that the Court should treat Sudan, as a matter of principle, as a non-party. There is no textual argument to be found in the Resolution (which accepts the distinction between states parties and non-parties) or in the Statute for treating Sudan as a state party. This means that Article 98(1) continues to apply in the case of al-Bashir, for as long as his immunity has not been explicitly waived, removed or otherwise made applicable.

Regardless of one's views on the immunity of al-Bashir, it should be acknowledged that there remains a significant degree of ambiguity and uncertainty about the obligation of states parties to arrest al-Bashir. This matter requires further attention from the Court and its states parties. There are several ways to clarify the ICC's immunity regime in general and the matter of al-Bashir's immunity in particular. Affected states could pursue a judgment from the ICC's Appeals Chamber or try to seek an advisory opinion from the International Court of Justice. In addition, the ICC's unresolved immunity regime could benefit from more specific procedural rules, and possibly an amendment of Article 98.

Chapter 4 turns attention to the AU's concern that the Court's trial proceedings have a negative effect on the ability of African presidents to fulfil their official responsibilities. This concern came up after the election of Kenyatta and Ruto as President and Deputy President respectively in 2013. In response to requests from the AU and the Kenyan government to excuse the new Kenyan leaders from continuous presence during their trials, the Court's judges initially showed flexibility and excused them from most trial hearings. These excusals had to be vacated, however, after the Appeals Chamber ruled

that an accused can only be excused from continuous presence at trial in exceptional circumstances and only when a number of additional conditions are fulfilled.

In a follow-up to this decision, the AU pressured the ASP to amend the provisions in the Statute on immunity and presence at trial. During an eventful meeting of the ASP in late 2013, many states acknowledged the concerns of the AU, but opposed the proposed amendments. As a compromise, the ASP agreed to revise the Rules of Procedure on presence at trial. Most importantly, the ASP agreed to adopt Rule 134quater, which would allow the Trial Chamber to excuse a sitting Head of State under more flexible conditions than the Appeals Chamber had formulated. A few weeks later, the Trial Chamber excused Ruto from most scheduled parts of his trial.

With the adoption and application of Rule 134quater, the Court and the ASP established an excusal regime based on ideas of flexibility and pragmatism. Chapter 4 provides a detailed analysis of this new excusal regime. It highlights that while most states parties found the excusal of sitting Heads of State a reasonable compromise, there are a number of problems with the new rules on presence at trial. Most importantly, Rule 134quater cannot be reconciled with the text of Article 63(1), which states that the accused 'shall be present during the trial'. The Appeals Chamber issued an authoritative decision on Article 63(1) in which it concluded that continuous presence should remain the rule. The new excusal regime ignores this condition, and thereby violates Article 51(4) of the Statute, which dictates that the Rules and amendments thereto 'shall be consistent' with the Statute.

Moreover, the excusal that the Trial Chamber granted to Ruto infringes upon the equal treatment principle that is embedded in the Statute. In a general sense, the careful formulation of Rule 134quater does not imply a distinction on the basis of official capacity, as it only speaks of 'extraordinary public duties' and not of sitting Heads of State. However, the way in which the Trial Chamber interpreted and applied Rule 134quater does amount to a distinction on the basis of official capacity. Instead of focusing on the extraordinary duties that Ruto personally has to fulfil, the Chamber based his excusal on the day-to-day functions of the Deputy President of Kenya under the Kenyan Constitution.

Of course, a certain level of flexibility and pragmatism may be needed when the accused has to fulfil important public duties, especially in unpredictable situations like a terrorist attack or a natural disaster. However, with Rule 134quater, the ICC's excusal regime goes far beyond short term absences for unpredictable situations. In response to the AU, the Court effectively conflated the official responsibilities of sitting Heads of State with the important public duties that an accused may have to fulfil in the context of unforeseen developments. In this way, the Court created a dubious precedent for treating sitting Heads of State in a different manner than another accused, simply because of their official status.

Chapter 5 concludes the dissertation and highlights that the Court, the Security Council and the ASP have not always responded to the AU's concerns in a legally convincing manner. What is more, with the exception of the new rules on presence at trial, the Court and its states parties have failed to resolve the AU's concerns about the prosecution and trial of sitting Heads of State. In recent years, the Court and its supporters have made several efforts to keep the AU and its member states on board. The Court's states parties have, for example, appointed an African as Prosecutor, elected an African as President of the ASP, and have organized various seminars, retreats and diplomatic visits aimed at improving the Court's relationship with Africa. These and other initiatives are important 'signs of good will' and have at certain points prevented further immediate escalation. However, none of the appointments or working groups have really helped to resolve the underlying concerns of the AU about the ICC. As things stand, the AU's campaign against the prosecution and trial of African presidents will likely continue. This will put further pressure on the Court and will affect its ability to obtain the necessary support for investigations and prosecutions in and outside of Africa.

This dissertation has analysed the responses from the Court, the Security Council and the ASP to the AU's concerns about the prosecution and trial of sitting Heads of State. Future studies will explore other legal, political and moral implications of the AU's disengagements with the ICC. Perhaps, the AU will eventually fall back in-line or maybe its opposition is just the beginning of the end for the Court's ability to play a meaningful role in Africa. Whatever happens, international law and international criminal law in particular have already paid a substantial price. The non-cooperation and rhetorical

opposition of the AU has been one thing, the legally questionable responses from the Court and its states parties have been another.

The bottom-line of this study is that the ongoing tensions between the AU and the ICC are not just a matter of power politics and self-interests leaders. The situation is much more complex than that. The AU is not simply legally wrong, and the ICC legally right, or the other way around. There are intricate legal issues at play between the AU and the ICC, that touch on unresolved aspects of the current international legal order, such as the inherent tension between the protection of state sovereignty and the advancement of human rights. These issues continue to require attention, and some issues like the immunity of al-Bashir and the ICC's dysfunctional deferral regime also demand (immediate) consideration by the Court, the Security Council and the ASP. This is necessary to bring the AU and the ICC closer together, to respect the Court's legal framework and ultimately to continue the development of international law in good faith.

Propositions

1. The most important reason for the African Union (AU) to criticize the International Criminal Court (ICC) is that the AU has strong concerns about the prosecution and trial of sitting Heads of State and Government.

2. While interpretation always entails a certain choice, applicable rules of interpretation can form an external standard and make some interpretations and in most cases one particular interpretation more convincing than others (Chapter 1).

3. In certain situations, the interests of peace ought to prevail over the interests of ICC prosecution, at least for a temporary deferral period (Chapter 2).

4. The different decisions of the Court's judges on the immunity of President Omar al-Bashir are based on an unconvincing interpretation of the Rome Statute, of Resolution 1593 of the Security Council and of international law more generally (Chapter 3).

5. The special excusal regime from continuous presence at trial (Rule 134*quater* of the Rules of Procedure and Evidence) that was developed by the ASP in response to the AU's concerns about the trials of President Uhuru Kenyatta and Deputy President William Ruto is unlawful and should be revised (Chapter 4).

6. The ICC, the Security Council and the ASP should increase their efforts to improve the Court's relationship with the AU and establish a constructive dialogue on possible amendments to the Court's legal framework (Chapter 5).